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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1521

THE DOW CHEMICAL COMPANY,
Petitioner

v.

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Dow Chemical Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case.

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[1] The National Labor Relations Board and the Chamber of Commerce of the United States were also parties in the proceeding before the Court of Appeals; pursuant to Supreme Court Rule 21(4) they are respondents with respect to this petition, although their interests are not adverse to Dow's.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 524 F.2d 853, —— U.S. App. D.C. —— (*infra*, p. 1a); its order denying rehearing has not yet been reported. The opinion of the National Labor Relations Board is reported at 211 NLRB No. 59, 86 LRRM 1381 (*infra*, p. 26a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 15, 1975. Rehearing was denied on February 4, 1976.

Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C.§ 1254 and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e).

QUESTIONS PRESENTED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, makes it an unfair labor practice for a labor organization to threaten, coerce or restrain any person where an object is to force him to cease doing business with, or cease dealing in the products of, another person.

The principal question presented is whether a union having a primary labor dispute with a producer violates this section when it pickets retailers dealing in the products of the struck producer who are separate and neutral employers with respect to the labor dispute, where the picketing is conducted in a manner calculated to induce members of the public to cease patronizing the retailers, and further

calculated to force the retailers to cease doing business with, and dealing in the products of, the producer in order to escape the substantial economic impact of losses of both customers and revenue, the nature of the retailers' business being such that an appeal to boycott the struck products is tantamount to an appeal not to patronize the picketed retail establishments at all.

An ancillary question presented is whether the Union adequately specified the struck products in its appeal to the public and confined its picketing to establishments actually offering those products for sale.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) are set forth below:

> Sec. 8 [29 U.S.C. § 158] Unfair labor practices.
>
> * * * *
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> (4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * *
>
> (b) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *:

Provided, That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * *

Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution; * * * *

STATEMENT OF THE CASE

A. The Facts

The respondent (hereinafter "the Union") commenced a strike against the Bay City plant (Bay Refining Division) of the petitioner (hereinafter "Dow") in February of 1972. (A. 160a).[2] The struck plant produced gasoline, fuel oil and a number of other hydrocarbon byproducts. Some of the gasoline was distributed to retailers who sold gasoline at stations in the local geographic area under the brand name "Bay".

[2] "A." references are to the record by the page numbers of the Appendix filed by the Union in the proceeding before the Court of Appeals.

At a meeting in February, 1973, after the strike had continued for a year, the Union's membership decided to commence "picketing of gas stations which were a prime outlet for Bay Gas" in order to "attempt to bring pressure on Dow" (A. 162-163a). Thereafter, the Union engaged in some 40 or more instances of picketing at a total of six gas stations in Bay City and nearby Midland, Michigan. (A. 259a). Two of the stations were owned by Central Michigan Petroleum, Inc.; three by Rupp Oil Company, Inc.; and one by Harold Alexander, Inc. The record contains a lengthy and detailed examination of the relationship between Dow and these retailers, which may be summarized briefly as establishing: (1) the retail stations were outlets of three independent corporations in which Dow had no proprietary interest; (2) although dependent upon Dow as a principal source of gasoline supply, the retailers were not contractually limited to purchasing from Dow; and (3) each retailer hired, supervised and determined the working conditions of its own employees and established its own labor relations policies entirely independently of Dow. None of the retailers had a labor dispute with the Union.

All of the stations picketed sold gasoline exclusively under the "Bay" name and displayed "Bay" signs and logos as their insignia (A. 15a, 31a, 72a). Gasoline was the principal product sold at each of the stations. At the five stations operated by Central Michigan and Rupp, gasoline sales accounted

respectively for approximately 81, 85, 91, 98 and 98 percent of total revenues, with the remainder coming from sales of other miscellaneous items and services, sales of which are generally incidental to the gasoline business. (A. 17a, 23a-25a, 30a-33a, 73a). Once having selected a "Bay" service station, customers rarely asked for automotive products by brand name; they generally trusted the selection of their serviceman. (A. 66a-68a). Harold Rupp testified that he could not possibly stay in business offering only these incidental items other than gasoline (A. 68a). Gasoline sales at the station operated by Alexander were described as "our bread and butter" (A. 84a), but the exact proportion of Alexander's revenues which was attributable to sales of Dow gas is not clear since some gasoline produced by other refiners was also sold by Alexander under the "Bay" name.

Some of the miscellaneous items sold in the stations, such as brake fluid and antifreeze, are Dow products (A. 160a-161a); however, neither the retail station operators, (A. 50a, 60a) their customers, (A. 66a-68a) nor even the Union (A. 171a) knew exactly which were the products of the struck plant and which were produced at other, nonstruck Dow plants. With the exception of motor oil, the miscellaneous non-Dow products were not generally competitive with, or substitutes for, the struck products.

The pickets at the gas stations carried signs bearing such legends as "Don't Buy Bay Gas" and "Bay Gas Made by Scabs" in large, prominent red lettering. (A. 19a-20a)[3] Although the Union's president

[3] The description of the signs is also based on photographic exhibits which were lodged with the Court of Appeals.

had instructed the members to "specify in some nature on the signs who we were and that we were on strike against Dow Chemical Company only and not the stations, we were picketing" (A. 165a), he had further explained that this information was not to be in large print on the signs (A. 168a). In accordance with these instructions, such references to the strike against Dow as did appear were in small, obscure black lettering (A. 121a). Moreover, the Union's president knew that some of the signs actually displayed by the Union's pickets referred only to "Bay" without specifying any product or referring to Dow. (A. 175a). Furthermore, when the Union learned that one gas station operator with a Bay sign had protested to the Union's International Staff Representative that the gasoline he was then selling through his pumps did not actually come from the struck plant, the Union continued to picket the station without regard to whether or not the gasoline sold there was in fact the "struck product". (A. 178a).

The Union's pickets conversed with customers entering the picketed stations; while the content of the conversations is not completely known, the result in some instances was that the customers would respond by driving across the street to patronize a competing, non-picketed station. (A. 115a). The Union's president received reports that the picketing of the gas stations was "very effective" (A. 171a) and that "a number of people had deterred [sic] from buying gasoline at the stations," but he did not know, and apparently did not attempt to discover, whether customers continued to cross the Union's picket lines for the purpose of buying non-

struck products. (A. 173a) The effectiveness of the picketing is illustrated by the approximately 20 percent decline in business experienced at one of Rupp's stations during March of 1973, as compared with the previous March, when the strike was in progress but gas stations were not picketed. (A. 36a). At Alexander's station, gasoline sales for the month in which the picketing commenced were down 62,000 gallons as compared with the corresponding month of the previous year. (A. 75a). Moreover, after the picketing commenced, a considerable number of Alexander's customers returned credit cards which had been issued by Alexander and which made no reference to Dow or Bay and could be used to purchase any product sold by Alexander. (A. 106a-108a).

B. The proceedings before the National Labor Relations Board.

Dow filed an unfair labor practice charge against the Union on March 13, 1973.[4] On May 22, 1973, the Chamber of Commerce of the United States (hereinafter the "Chamber") filed a charge substantially similar to Dow's and relating to the same Union conduct. The Board ultimately proceeded on an amended consolidated complaint encompassing both charges.

Upon a joint motion by all parties, the administrative proceeding was transferred to the Board without a hearing before an Administrative Law Judge for

[4] The charge was initially dismissed by the Regional Director for Region 7. An appeal by Dow was sustained by the General Counsel, who remanded the case to the Regional Director with instructions to issue a complaint. (A. 206a)

submission on a stipulated record, which included the transcript and exhibits from a related District Court injunction proceeding[5] and a supplemental stipulation of facts. The Board granted the motion on August 29, 1973. (A. 268a). None of the parties had requested oral argument, but on December 21, 1973, the Board took the unusual action of ordering *sua sponte* that the case be set down for oral argument, "having determined that the instant case raised issues of substantial importance in the administration of the Act." (A. 270a). Oral argument was heard by the full Board on January 7, 1974.

On June 18, 1974, the Board, Chairman Miller and Members Kennedy and Penello concurring, issued its Decision and Order, *infra*, p. 26a.

The Union had contended that because of the business relationships between the stations' operators and Dow, they were not neutral parties entitled to protection from picketing in furtherance of a labor dispute with Dow. The Board easily disposed of this contention. "The short answer to this line of argument is that the Board does not normally predicate loss of neutral status on economic interdepen-

[5] The Board's Regional Director filed a petition for an injunction pursuant to Section 10(l) of the Act, 29 U.S.C. § 160(1) in the United States District Court for the Eastern District of Michigan. The District Court heard testimony on May 23 and 24, 1973. The Union moved for dismissal of the injunction petition on the ground that the evidence showed only permissible consumer picketing. The Union's motion was denied (A. 140a-142a); however the District Court never did issue a final decision on the merits.

dency alone, absent such factors as common ownership or managerial control." (*infra*, p. 33a-34a).

The Union had also contended that consumer picketing aimed at Dow's products was lawful under the *Tree Fruits* decision of this Court.[6] Dow had contended that in the *Tree Fruits* case the Washington State apples which were the struck product were an insubstantial part of the retail business of the grocery stores where picketing occurred, and that the appeal to consumers in that case would not have discouraged consumers totally from patronizing the grocery stores. Dow argued that the likelihood in the instant case that consumers would be induced to totally boycott the picketed retailers was such that this could fairly be found to be an intended result of the Union's conduct.

The Board agreed with Dow's argument that this factual distinction is legally significant. "Where by the nature of the business and of the picketing it is likely that customers who are persuaded to respect the picket signs will not trade at all with the neutral party, we in turn are persuaded that a true *Tree Fruits* situation does not exist, and that we are at the very least required to make our own in-

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[6] *N.L.R.B.* v. *Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58 (1964). The case involved picketing which urged customers of Safeway grocery stores not to purchase a particular brand of apples produced by growers with whom a union had a labor dispute. This Court held that the particular picketing involved did not threaten, coerce or restrain Safeway, and therefore did not violate Section 8(b)(4) of the Act. The case is commonly known as "*Tree Fruits*," a reference to the Tree Fruits Labor Relations Committee, Inc., which filed the unfair labor practice charge.

dependent judgment as to whether the picketing is permissible under the Act." (*Infra*, p. 35a).

The Board reasoned that in *Tree Fruits* it was the minimal impact which the picketing would have had, if successful, upon the total business of Safeway which was the basis of the holding that the picketing in that case did not "threaten, coerce, or restrain" the retailer within the meaning of Section 8(b)(4). The Board found the present case substantially different. Here the picketing was reasonably calculated to induce customers not to patronize the neutral retailers at all, since gasoline sales and minor items incidental thereto comprised most of their business. "Some, at least, would predictably be forced out of business if the picketing were successful, and all would predictably be squeezed to a position of duress, escapable only by abandoning Dow in favor of a new source of supply." (*Infra*, p. 36a). The Board went on to emphasize that it was the predictability of this impact that had led the Board to conclude that the picketing had an unlawful object. Reviewing the intent of Congress in enacting Section 8(b)(4), the Board stated its conclusions as follows:

> "We think that, mindful of the conclusion reached in *Tree Fruits*, fidelity to that congressional intent does not permit so niggardly an interpretation of the terms 'threaten, coerce, or restrain' as would be necessary to find that these terms do not apply, within the meaning of Section 8(b)(4), to what this Respondent is doing to these gas station operators. Accordingly, we find that the picketing violated Section 8(b)(4)(ii)(B) of the Act." (*Infra*, p. 37a).

The Board ordered the Union to cease and desist from engaging in the unfair labor practices found by the Board and to take certain affirmative action designed to effectuate the policies of the Act.

Members Fannings and Jenkins dissented, stating their belief that under *Tree Fruits* picketing which follows the struck goods is lawful, regardless of the character and extent of harm inflicted upon netural retailers.

C. The proceedings before the Court of Appeals.

The Court of Appeals considered the case on the Union's petition for review and the Board's cross-application for enforcement of its order pursuant to Sections 10(e) and (f) of the Act, 29 U.S.C. § 160 (e) and (f). Dow and the Chamber were granted leave to intervene. The case was argued before a panel consisting of Chief Judge Bazelon, Senior Circuit Judge Fahy, and Circuit Judge McGowan, who issued their decision on December 15, 1975, in an opinion written by Senior Circuit Judge Fahy.

The opinion admitted the factual correctness of the distinction drawn by the Board; i.e. that the picketing in *Tree Fruits* was of such a character as to have a "minimal" impact on the Safeway grocery stores, even if successful, while picketing in the instant case threatened the retail gas station operators with the probability of substantial economic injury. (*Infra*, p. 9a) It disagreed, however, with the Board's attribution of legal significance to this factual difference: "While the small part the struck product in the whole of the Safeway business was not overlooked by the [Supreme] Court, it was not

the basis for the decision [in *Tree Fruits*]." (*Infra*, p. 11a).

While admitting that the Board's interpretation "has its persuasiveness" (*infra*, p. 16a), the opinion suggested that the court was entirely free to substitute its own interpretation. The opinion reasoned that the necessity of giving consideration to the applicability of a Supreme Court decision made statutory construction in this case "a judicial function no less than an agency's." (*Infra*, p. 16a). The Court of Appeals did not, therefore, give the Board's decision "the usual deference due an agency's construction of the statute it administers." (*Infra*, p. 16a) The opinion further indicated that the court favored its own interpretation over the Board's under the principle of construction to avoid constitutional doubts. Deference to the Board's construction, even though persuasive, would require the court to resolve an "arguable" First Amendment issue raised by the Union's contention that picketing aimed at consumers cannot be constitutionally enjoined. (*Infra*, p. 16a). The panel therefore granted the Union's petition to set aside the Board's order and denied the Board's petition for its enforcement.

Dow and the Chamber filed petitions for rehearing and suggestions for rehearing in banc, which were denied on February 4, 1976. The order of the full court below disclosed, however, that the judges of the District of Columbia Circuit were closely divided, 5 to 4. Circuit Judges Tamm, MacKinnon, Robb and Wilkey indicated that they would have granted rehearing. (*Infra*, p. 25a).

REASONS FOR GRANTING THE WRIT

A. Clarification by this Court of its *Tree Fruits* decision is needed to resolve questions of substantial importance in the administration of the National Labor Relations Act.

The National Labor Relations Board, the agency charged with responsibility for administering the National Labor Relations Act, characterized the instant case as one which "raised issues of substantial importance in the administration of the Act." (*Infra*, p. 28a). This Court has often cited similar grounds as a reason for granting certiorari.[7]

The history of this case amply illustrates the difficulties encountered in any attempt to perceive the proper application of this Court's decision in *Tree Fruits* to variant factual situations of the sort presented by the instant case. Certainly Dow would contend that certiorari should be granted to consider whether the Court of Appeals has misconceived the meaning[8] or misapprehended the scope[9] of *Tree Fruits*. But even apart from these grounds, it can hardly be denied that the applicability of the *Tree Fruits* decision to the instant case is sufficiently ambiguous to have caused great difficulty for the Board and courts alike. This petition calls upon this Court not merely to correct error but to respond to the urgent need for clarifying the implications of

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[7] See, for example, *United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946); *Rothensies* v. *Electric Battery Co.*, 329 U.S. 296, 299 (1946).

[8] See *Wilkinson* v. *United States*, 365 U.S. 399, 401 (1961).

[9] See *Schlude* v. *Commissioner*, 372 U.S. 128, 130 (1963).

the *Tree Fruits* decision, a need such as the Court has recognized as a reason for granting certiorari.[10]

B. This case requires the decision of questions which this Court did not reach in Tree Fruits.

To keep *Tree Fruits* in its proper perspective, it is helpful to recall that the central issued resolved in that decision was one which is not in contention at all in the present case.

Prior to *Tree Fruits*, Section 8(b)(4) was thought generally to prohibit a union engaged in a labor dispute with one employer from picketing at another neutral employer's premises. Although the statute spoke in terms of "threaten, coerce or restrain", it was widely assumed that "all picketing is obviously conducted to coerce". Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 Mich. L. Rev. 191, 207 (1950). It was this assumption which was contested in *Tree Fruits*, and the only clear meaning of that decision (which is not questioned in the instant case) was a rejection of the then prevailing theory that picketing *per se* is necessarily within the statutory language "threaten, coerce or restrain". This result was required, in the opinion of this Court, by essentially two considerations: (1) the legislative history did not clearly indicate that Congress had determined that all picketing necessarily threatens, coerces or restrains; and (2) such a determination would be suspect under the First Amendment. This much is clearly the holding of *Tree Fruits*.

It is the next logical step in the analysis upon which the present controversy is based and for

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[10] See *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

which *Tree Fruits* does not provide a clear and unambiguous resolution. If picketing cannot be held to "threaten, coerce or restrain" *per se*, then whether or not picketing at secondary premises violates the statute in a particular case must depend upon whether or not it is proven to "threaten, coerce or restrain" neutral employers in fact. In *Tree Fruits* this Court was satisfied that the particular picketing involved did not in fact "threaten, coerce or restrain" the neutral retailer at whose stores picketing was conducted. On this point the majority discussed only the particular factual situation before the Court and resisted the invitation to consider the difficulties which factually variant situations might raise.

There are many factors which may have influenced this Court to find that Safeway was not threatened, coerced or restrained by the picketing in *Tree Fruits* which are absent in the present case. Most important, in the Board's view, was that the picketing in *Tree Fruits* merely asked the public to refrain from buying a single item which was miniscule in the context of Safeway's entire business. Even the most ardent unionists could continue essentially normal patronage of Safeway while simply shifting individual item selection from one brand of apples to another sold by Safeway, or from apples to another fruit sold by Safeway. Safeway probably did not care which particular products its customers purchased, so long as they continued to do their shopping at Safeway.[11]

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[11] Safeway did not participate in any capacity at any stage of the proceedings in *Tree Fruits*, nor did the record indicate that Safeway ever voiced concern over the picketing.

The pickets' appeal in the instant case presents a very different situation. Gasoline occupies a peculiarly preeminent role in the business of a retail gasoline station for two reasons: (1) its sale represents as much as 98% of total station revenue; and (2) such other product sales as there are tend to be accomplished mainly incidentally to transactions in gasoline. In this context, the picketed retailer is not faced merely with a minor shift in the product mix sold, but rather with substantial and potentially disastrous losses of both customers and revenue. These implications are very different in their character and magnitude than those faced by Safeway, and they were plainly a cause of great concern to the gasoline station operators. Did this picketing therefore "threaten, coerce or restrain" these neutral retailers? The Board held that it did, distinguishing *Tree Fruits*, and the Court of Appeals disagreed, insisting upon clinging to the literal language of the *Tree Fruits* decision regardless of the factual differences.

Such a literal approach to the interpretation of this Court's opinions may, as the Court recently cautioned, lead to "absurd and unintended results." *Michigan* v. *Mosley*, —— U.S. ——, 96 S. Ct. 321, 325 (1975). "General expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1945). Dow suggests that the language of the *Tree Fruits* decision must be read in the light of the peculiar facts of that case, bearing in mind, as always, that the Court can seldom, if ever, completely investigate the possible bearing of its opinions on variant situations which may be presented by later cases. See *Cohens* v. *Virginia*, 19 U.S. 264, 399-400 (1821). See also

Green v. *U.S.*, 355 U.S. 184, 197 (1957); *Teamsters Union* v. *Hanke*, 339 U.S. 470, 479-480 (1950); *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 604 (1949); *U.S.* v. *Pink*, 315 U.S. 203, 243-244 (1942) (Stone, C.J. dissenting); *Humphrey's Executor* v. *U.S.*, 295 U.S. 602, 626-627 (1935); *Williams* v. *U.S.*, 289 U.S. 553, 568 (1933); *O'Donoghue* v. *U.S.*, 289 U.S. 516, 550 (1933); *Carroll* v. *Lessee of Carroll*, 57 U.S. 275, 287 (1854).

After comparing the facts of the instant case to those before this Court in *Tree Fruits*, the Board was persuaded that "a true *Tree Fruits* situation does not exist". (*Infra*, p. 35a). Dow suggests that the Board acted properly in not blindly applying the literal language of *Tree Fruits* outside of its proper factual context. As this Court has specifically warned, rigid rules and broad generalizations are not possible in Section 8(b)(4) cases. *Electrical Workers, Local 761* v. *NLRB*, 366 U.S. 667, 674 (1961). Moreover, *Tree Fruits* was decided on the basis of the *Trinity Church* doctrine,[12] and it has long been recognized that cases decided on this basis should be narrowly limited to their specific facts and followed in other situations only with "great caution and circumspection." *Crooks* v. *Harrelson*, 282 U.S. 55, 59-60 (1930).

The question now presented is particularly intriguing, however, for the very reason that, even though not decided, it was not entirely unanticipated in this Court's previous deliberations. Justice Harlan, dissenting in *Tree Fruits*, 377 U.S. at 83, raised

[12] *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), cited in *Tree Fruits*, 377 U.S. at 72.

hypothetically the very question presented by this case:

> "The distinction drawn by the majority becomes even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product. If, for example, an independent gas station owner sells gasoline purchased from a struck gasoline company, one would not suppose he would feel less threatened, coerced, or restrained by picket signs which said 'Do not buy X gasoline than by signs which said 'Do not patronize this gas station'

The majority made no attempt to respond to this hypothetical problem. Dow assumes that in keeping with the usual practice of this Court, the draft of Justice Harlan's dissenting opinion was circulated among all the members of the Court long before the majority opinion was published,[13] and that the majority's silence upon Justice Harlan's gas station hypothetical must therefore have represented a deliberate choice by the majority not to attempt to resolve it. It is therefore not unreasonable to characterize the question raised by this case as one left undecided and deliberately reserved by the Court in *Tree Fruits* for future determinations, a further reason why certiorari should be granted.[14]

C. This case presents a recurrent question upon which judicial opinion is divided.

The aftermath of *Tree Fruits* has been a series of cases in which unions conformed picketing to the

[13] See Clark, *The Supreme Court Conference*, 19 F.R.D. 303, 308 (1956).

[14] Cf. *F.T.C.* v. *Travelers Health Assn.*, 362 U.S. 293, 297 (1960).

literal language of the *Tree Fruits* decision in situations in which it was apparent that the real economic impact of the picketing on neutral parties would be very different from that experienced by Safeway. The Board has developed a policy refusing to extend *Tree Fruits* to such factually distinguishable situations. The Board's policy has found support in reported court decisions arising in several different Circuits. See *Hoffman* v. *Cement Masons Union Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986; *American Bread Company* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969); *Twin City Carpenters Dist. Council (Red Wing Wood Products, Inc.)*, 167 NLRB 1017, *enforced* 422 F.2d 309 (8th Cir. 1970); *Salem Building Trades Council (Cascade Employers Ass'n)*, 163 NLRB 33, *enforced per curiam* 388 F.2d 987 (9th Cir. 1968), *cert. den.* 391 U.S. 965 (1968); *Honolulu Typographical Union No. 37* v. *NLRB*, 131 U.S. App. D.C. 1, 401 F2d 952 (D.C. Cir. 1968). The decision of the court below in the present case undesirably conflicts with an otherwise consistent pattern of authority.

Dow would suggest that the Court of Appeals for the Sixth Circuit has advanced the most workable criteria yet for applying *Tree Fruits*: in *Tree Fruits* consumers could continue their normal shopping at Safeway and still sympathize with the union; the *Tree Fruits* result is inapplicable where "to cease purchasing the single item would almost amount to customers stopping all trade with the secondary employer." *American Bread Company, supra*, at 154.

A close division of judicial opinion within the District of Columbia Circuit itself is apparent not only from the vote on the suggestions for rehearing

in banc in the instant case but also from the striking differences between the opinion in this case and the opinion of a different panel of the same court in the earlier *Honolulu Typographical Union* decision, *supra*.[15] There the same court emphasized the realistic meaning of picketing appeals over superficial attempts to take advantage of the legal concept evolved for the *Tree Fruits* situation. Responding to the argument that the Board's policy of limiting *Tree Fruits* would give broader immunity to those secondary sellers whose total business is indistinguishable from the struck primary products they retail, the court answered that "the law makes distinctions in terms of the tradition and economic realities of Union pressure, even though this may result in differences not easily subject to logical delineation between the scope and kinds of picketing available to unions in different labor circumstances." 131 U.S. App. D.C. at 5, 401 F.2d at 956. Congress, the court then believed, had determined that the neutral's interest in avoiding a boycott is more deserving of protection, and the union's interest in cutting off the primary employer's markets must yield.

The decision of the Court of Appeals for the District of Columbia Circuit in the instant case cannot be reconciled with the pattern which emerges from a fair reading of the other decisions cited above. The Court of Appeals ignored some of these cases

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[15] In addition to resolving conflicts among the different circuits, this Court has previously indicated that certiorari may be appropriate to resolve a conflict in the rulings of a single circuit due to the differing views of the judges composing that court. See *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939).

and made an unconvincing attempt to distinguish others upon the basis of rather attenuated factual differences. Dow suggests that it would be a wiser policy to confront the disharmony and resolve the conflict which now exists. Certiorari should be granted to accomplish this purpose.

D. Failure by the Court of Appeals to accord weight to an administrative construction of the Act conflicts with the decisions of this Court.

It is well established under the decisions of this Court that "not only are the findings of the Board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight." *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 691-692 (1951). Such deference would seem especially appropriate in secondary boycott cases, an area in which this Court has characterized statutory interpretation as an "evolutionary process" in which the Board, with its special appreciation of the complexities of the subject, responds to "unfolding variant situations" over a period of time on the basis of accumulating experience. *Electrical Workers, Local 761* v. *N.L.R.B.*, 366 U.S. 667, 674 (1961). It is apparent that the present case is not an identical recurrence of the *Tree Fruits* situation, but is rather the very sort of unfolding variant situation which calls for the Board's experience and expertise in the evolution of the statute's construction.

While admitting in this case that the Board's position "has its persuasiveness", the Court of Appeals went on to assert that the Board's determination "is not entitled to the usual deference due an agency's construction of the statute it administers; for the case involves the appropriate application of a construction of the statute by the Supreme Court." (*Infra*, p. 16a). The Court of Appeals cited no authority for this rather novel proposition, and Dow suggests that it conflicts with the decisions of this Court.

The rationale advanced by the Court of Appeals for simply substituting its own judgment for that of the Board is not in harmony with this Court's decisions. Where a particular statutory provision has been the subject of both administrative and judicial construction, the Court has held that the agency's interpretation will continue to have persuasive weight unless "so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law." *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39, 52 (1939). In the instant case the Court of Appeals did not even purport to make the finding which, under this Court's decision in *Sanford*, would be required to reject the Board's construction.

A Supreme Court decision should not, as the Court of Appeals has suggested, extinguish the role of the Board. A Supreme Court decision establishes basic objectives; the primary responsibility for adapting those basic objectives to differing situations and changing circumstances must continue to rest with the Board. See *Hudgens* v. *NLRB*, —— U.S. ——, —— S. Ct. ——, 44 U.S.L.W. 4281, 4286 (U.S. No. 74-773, March 3, 1976).

E. Reliance by the Court of Appeals upon the doctrine of construction to avoid Constitutional doubts in this instance conflicts with the decisions of this Court.

The Union advanced the theory that to prohibit peaceful picketing in this case would be unconstitutional under the First Amendment. The theory borders upon being frivolous, inasmuch as this Court long ago held that picketing to accomplish a secondary boycott in violation of the National Labor Relations Act may be constitutionally enjoined. *Electrical Workers, Local 501* v. *NLRB*, 341 U.S. 694, 705 (1951). The Union attempted to distinguish *Electrical Workers* on the basis that the picketing in the instant case was aimed at influencing customers, rather than employees, of the retailers to be boycotted. Since this distinction had been clearly rejected by this Court in *Hughes* v. *Superior Court*, 339 U.S. 460 (1950), the Union's constitutional argument lacked any real substance. The Court of Appeals did not characterize this issue as serious, but merely "arguable" (*infra*, p. 19a). Nevertheless, the Court of Appeals asserted that the doctrine of construction to avoid constitutional doubts required that it reject the Board's construction of the statute merely in order to avoid having to decide this rather simple constitutional issue.

The primary objective of statutory construction is to effectuate Congressional intent. It is clear that in enacting Section 8(b)(4) Congress intended a broad prohibition against all secondary boycotts; it rejected any distinction between "good" and "bad" secondary boycotts.[16] Notwithstanding the narrow

[16] See 93 Congr. Rec. 4198 (remarks of Senator Taft).

exception allowed by this Court in *Tree Fruits*, both the majority (377 U.S. at 64-70) and the dissenters (377 U.S. at 84-92) recognized that picketing aimed at consumers at a secondary retail establishment was generally included within the scope of the Act's prohibitions. The Board found in the circumstances of the instant case that "fidelity to that Congressional intent does not permit so niggardly an interpretation of the terms 'threaten, coerce or restrain' as would be necessary to find that these terms do not apply, within the meaning of Section 8(b)(4), to what this Respondent is doing to these gas station operators." (*Infra*, p. 37a). The canon of avoidance of constitutional doubts does not, under this Court's decisions, give the Court of Appeals a license to frustrate those Congressional purposes which the Board has attempted to effectuate. The decision of the Court of Appeals is in conflict with this Court's characterization of that canon as one which must give way to "the equally well-settled doctrine of this Court to read a statute, assuming that it is suspectible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro* v. *United States*, 335 U.S. 1, 31 (1948).

F. This Court should act to correct the injustice resulting from failure of the Court of Appeals to remand the case to the Board for the consideration of alternative grounds.

The basis upon which the Board made its determination was only one of several alternatives urged by Dow as Charging Party. The Board held that its resolution of the *Tree Fruits* issue made it un-

necessary to consider alternative theories upon which the complaint might have been sustained. The Court of Appeals, in turn, confined its review to the reasons assigned by the Board. Assuming, *arguendo*, that the Court of Appeals correctly held the Board's finding invalid, it would seem only just and equitable to remand the case so that the alternative theories urged by Dow may receive proper consideration.

The record suggests that there at least three arguable alternative theories upon which the Board could have sustained the complaint consistent with the opinion by the Court of Appeals. Full consideration of these alternatives is essential to assure that a just result is reached. If the Union's conduct might be found unlawful on any of several independent theories, it should not be permitted to escape the consequences by merely persuading the Court of Appeals that the one theory which the Board considered dispositive is invalid.

First. The Board found that most of the picketed retailers' business consisted of "gasoline sales and minor items incidental thereto." (*Infra*, p. 36a). The Board concluded from this fact that successful picketing would so predictably have a major economic impact on the retailers that an object of the picketing must have been to "threaten, or coerce or restrain" the retailers within the meaning of Section 8(b)(4) of the Act. The Court of Appeals rejected an economic impact test; however, neither it nor the Board considered an additional issue implicit in the fact that the retailers made sales of minor items *incidental* to gasoline sales. The Board should be given the opportunity to consider whether the appeal of the pickets was truly confined to the struck product or

whether it necessarily encompassed non-struck products whose sales are incidental to gasoline patronage.

Second. There is a very substantial question as to whether the picket signs adequately specified the boycotted product. The Board expressly avoided deciding this question. (*Infra*, p. 29a). The Court of Appeals also avoided deciding the question, but made the gratuitous observation that "we do not believe, given the state of the record, that the wording itself of any picket signs led consumers to believe the picketing was directed to other than Bay gas". (*Infra*, p. 4a). Since, of course, the court was discussing a possible finding of fact which the Board has not yet made, the court's belief is immaterial. Moreover, the court appears to have misapprehended the standard to be applied if the Board should take up this question. The record need not include proof that consumers were in fact deceived. "The dispositive factor is the *probable* effect of the picketing upon the consumer." *Kaynard* v. *Independent Routemen's Association*, 479 F.2d 1070, 1073 (2d Cir. 1973) (emphasis added); see also *Hoffman* v. *Cement Masons Union, Local* 337, 486 F.20 1187, 1192 (9th Cir. 1972), *cert. denied*, 411 U.S. 986.[17]

Third. A final theory, which the Board did not find it necessary to consider but which seems obvious beyond all argument, relates only to the picketing of retailer Harold Alexander Inc. Dow was not Alex-

[17] Indeed, the picket signs found inadequate in *Kaynard*, *supra*, were virtually identical in the nature of their deficiencies to the signs used by the Union in the present case and the court in *Kaynard* was satisfied by proof in the form of photographic exhibits similar to those lodged with the Court of Appeals in this case.

ander's sole source of gasoline, and Alexander's use of multiple sources of supply raises a question which must be resolved before the complaint can properly be dismissed. When the Union picketed Alexander, was he in fact selling the struck product? The record indicates that at the time of the picketing Alexander was selling gasoline from a source other than Dow, that he so notified the Union, and the Union continued to picket anyway. (A. 178a). It is therefore quite clear that the Union was not appealing to consumers to refrain from buying the struck product but rather to boycott Alexander because he had previously sold, or might at some future time again sell, the struck product. The Union has never offered even the slightest justification for the obviously illegal course of conduct, and justice requires that the Board be given the opportunity to consider finding a violation on this basis.

CONCLUSION

For the foregoing reasons, The Dow Chemical Company respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1632

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
DOW CHEMICAL COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Intervenors.

Argued May 22, 1975

Decided Dec. 15, 1975

* * * *

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

Carl B. Frankel, with whom Michael H. Gottesman, Washington, D.C., was on the brief for petitioner.

John H. Ferguson, Atty., N.L.R.B., with whom John S. Irving, Deputy Gen. Counsel, Patrick Har-

din, Associate Gen. Counsel, and Elliott Moore, Deputy Associate Gen. Counsel, N.L.R.B., were on the brief for respondent.

William A. Jackson, with whom Robert E. Williams, was on the brief for intervenor, The Dow Chemical Co.

Gerard C. Smetana, Chicago, Ill., with whom Milton A. Smith, Washington, D.C., Lawrence M. Cohen and Steven R. Semler, Chicago, Ill., were on the brief for intervenor The Chamber of Commerce of the United States.

Before BAZELON, Chief Judge, FAHY, Senior Circuit Judge, and McGOWAN, Circuit Judge.

FAHY, Senior Circuit Judge:

The Union petitions for review of an order of the Labor Board which holds that the Union had violated section 8(b)(4)(ii)(B)[1] of the Labor Act by

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[1] Section 8(b)(4)(ii)(B) of the National Labor Relations Act, *as amended* by the Labor-Management Reporting and Disclosure Act of 1959, is codified as 29 U.S.C. § 158(b)(4)(ii)(B). In relevant part it is reproduced, in context, below:

"It shall be an unfair labor practice for a labor organization or its agents—

* * * *

"(4) * * * (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

* * * *

"* * * *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

engaging in a secondary boycott to be described. 211 NLRB No. 59. The Board has cross-applied for enforcement of its order.

I

The controlling facts are not in dispute. The Union, while on strike against the Bay Refining Division of the Dow Chemical Company in Bay City, Michigan, picketed six gas stations in the surrounding area. The stations, as the Board stated, derived "their revenues largely from the sale of this gasoline, marketed under the trade name of 'Bay'. The picket signs asked consumers to Boycott Bay gaso-

line."[2] The percentage of Bay gas revenues to the respective total revenues of the stations was approximately as follows: Of the $280,000 gross annual revenue of one station 81% to 86% came from the sale of this gas; about 85% of the gross sales of $140,000 at a second; at a third station, in operation only about six months, $39,000 of its $40,000 gross revenues was due to Bay gas. The Board stated that this station, however, "leases its servicing facilities to an independent mechanic, and neither the lease rental nor the income of the mechanic (both unknown) is included in the $40,000 figure." A fourth station had gross revenues of $68,000, of which 91% came from "Bay gas and oil and other Dow products such as radiator sealer, brake fluid, and windshield solvent". At a fifth station, 98% of its gross revenues of $45,000 was attributable to this gas. The sixth station, referred to as Alexander's, grossed altogether about $1,200,000 a year. Regarding this station the Board stated: "It is also a General Tire dealership. Its fuel (gas and diesel oil) sales account for 60 to 65 percent of gross revenues," and, the Board continued:

> This station sells gas other than Bay brand, and Alexander's owner, while at one point in his testimony estimated that Bay represented about 75 percent of his fuel sales, later stated that for the current year he did not know how much

[2] We do not believe, given the state of the record, that the wording itself of any picket signs led consumers to believe the picketing was directed to other than Bay gas. As shall appear, however, we limit our decision respecting the validity of the order under review to the reasons assigned by the Board for holding the picketing to have been unlawful under Section 8(b)(4).

> of the gas he sold was Bay. While it is not entirely clear from the record, it would appear that potential customers would not generally have known that gas other than Bay was available at the station.

Thus, if Bay gas accounted for about 75% of its fuel sales and its fuel sales accounted for 60 to 65 percent of its gross, Bay gas accounted for less than 50% of its gross revenues.

All six stations marketed products other than Bay gas. The variety of these products was quite great in the aggregate, but the percentage of revenue from them is as above stated.

The essential facts regarding the picketing we think are fairly stated in the dissenting opinion of Members Fanning and Jenkins as follows:

> . . . the picketing of the six retail gas stations was at all times peaceful . . . . The record also reveals that the picketing did not cause any employee to stop working nor otherwise interfere with deliveries to or pickups from the picketed sites, nor in any manner obstruct customer ingress and egress. The evidence affirmatively shows that the pickets stationed themselves on sidewalk locations away from entrances or exit driveways, that they did not appear until the station opened, and that they departed before it closed. The evidence also discloses that the . . . pickets limited their appeal to the struck product—"Bay gasoline." The legends on the picket signs generally stated: "Don't Buy Bay Gas," "Boycott Bay Gas," and "Bay Gasoline Made by Scabs."

In *Labor Board* v. *Fruit Packers*, 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964),[3] the Court held that a union did not violate section 8(b)(4) by peacefully picketing Safeway Stores, with whom it had no dispute, urging their customers not to buy Washington State apples, purchased by the Safeway Stores from firms with whom the union did have a labor dispute.

In the present case the Board, deciding first that the six stations were neutral in the Union's dispute with Dow Chemical, notwithstanding certain close business relationships between the stations and Dow aside from their purchase of Bay gas, held the result depended upon whether the *Tree Fruits* decision of the Supreme Court applied. Being of the view that it did not, the Board's conclusion of the unlawfulness of the picketing under section 8(b)(4) followed. The Union, while not altogether ignoring the questioned relationship of the stations with Dow as it bears upon the neutrality of the stations,[4]

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[3] This case is frequently referred to as *Tree Fruits*, which derives from the name of the organization of apple growers which filed the charges before the Board: Tree Fruits, Inc. [hereinafter *Tree Fruits*].

[4] The Union's brief speaks of an "economic interdependence between Dow and the six picketed retailers . . . ." The Union argues that, if anything, such an interdependence tends to make picketing of the secondary more akin to primary picketing: "increasing the mutual interdependence between struck supplier and retailer serves to increase not decrease the 'primary' character of the picketing." Brief at 24. Further, it is urged, "when the struck goods rise toward being the sole product of the secondary seller, he may, by virtue of his economic interrelationship with the primary supplier, become an 'ally' of the latter and thus lose his neutral status." Brief at 24-25. The Union suggests that the retailers might have to be considered as allies of Dow because of their "closely intertwined economic interdependency." The court will not upset the Board's finding of neutrality, but agrees that the putative alliance between a primary and a secondary selling almost exclusively the goods of the primary weakens the force of an "economic impact" test.

assumes the neutral status of the gas stations in relying now primarily upon the applicability of *Tree Fruits*.

The Board accurately described as follows the holding of the Supreme Court in *Tree Fruits*:

> that Section 8(b)(4) does not proscribe peaceful consumer picketing which is employed only to persuade customers not to buy the struck product, as opposed to picketing to persuade consumers to cease all trading with the secondary retailers.

Considering the factual situation in *Tree Fruits*, however, the Board interpreted the Court's decision as follows:

> In *Tree Fruits*, the Supreme Court majority, finding that Section 8(b)(4) did not prohibit all peaceful consumer picketing at secondary sites, decided that the minimal impact the picketing there would have had, if successful, upon the total business of the secondary retailer would not justify a conclusion that an object of the union was to persuade the retailer to discontinue handling the struck product to cut its losses. It was on that basis, in our opinion, that it held that the picketing in that case did not 'threaten, coerce, or restrain" the retailer within the meaning of Section 8(b)(4).

As to these six gas stations, however, the Board saw a substantially different situation, stating it as follows:

> . . . the picketing was reasonably calculated to induce customers not to patronize the neutral parties, in this case the gas station operators, at all. Even though some of the stations involved sell tires and provide repair service, which special aspects of their business might be relatively unimpaired, most of their business is gasoline sales and minor items incidental thereto. Some, at least, would predictably be forced out of business if the picketing were successful, and all would predictably be squeezed to a position of duress, escapable only by abandoning Dow in favor of a new source of supply. It is not only the potential impact of the picketing, however, that distinguishes this case from *Tree Fruits*. It is, more importantly, the predictability of such impact that leads us to conclude that the picketing had an unlawful object.

Our disagreement with the conclusion thus reached is not conceived as a failure to accord due weight to a conclusion of the Board in a respect committed to its special expertise. Our position is due to a failure of the Board in our opinion to accord to peaceful picketing, directed to a struck plant which is marketed at a secondary site, the favorable consideration to which it is entitled under *Tree Fruits* in determining both the object of the picketing under section 8(b)(4) and the duress the section tolerates in the circumstances of this case. We have a problem, also, with respect to the degree of success the Board contemplates in drawing a conclusion upon the supposition of successful picketing.

It is undoubtedly true that if the picketing in *Tree Fruits* were successful, the impact upon the total business of the Safeway Stores would be minimal. In contrast, considering the nature of the gasoline service station business, it is indeed likely that a successful consumer boycott of Bay gas would have substantial economic impact upon these six retail outlets. However, the Board was not unanimous that it was the limited economic impact on Safeway which rendered lawful the picketing in *Tree Fruits*. Nor did our court so interpret *Tree Fruits* in *Honolulu Typographical Union No. 37* v. *NLRB*, 131 U.S.App.D.C. 1, 401 F.2d 952 (1968). The *Honolulu* court at least left open much that the Board considers the Supreme Court had foreclosed in *Tree Fruits*:

> We need not decide in this case, nor do we intimate a view on, the question whether a secondary seller who sells only the struck primary product may be picketed even though the appeal necessarily amounts to a request that consumers cease all patronage. That was, in substance, the hard problem posed by the *Tree Fruits* [] dissenters. . . .

Id. at 956, n. 9.

In our view the decision of the Supreme Court may not be limited in its application to a factual situation in which the struck product constitutes only a small part of the business of the secondary retailer; though the facts of the case decided are as we have stated, we think the reasoning of the opinion —its governing principles—formulated in light of the legislative history of section 8(b)(4), are not con-

fined to the factual situation which was before the Court. The Court stated:

> We have examined the legislative history of the amendments to § 8(b)(4), and conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an "isolated evil" believed to require proscription of peaceful consumer picketing at secondary sites, was its use to persuade the customers of the secondary to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute. This is not to say that this distinction was expressly alluded to in the debates. It is to say, however, that the consumer picketing carried on in this case is not attended by the abuses at

> which the statute was directed. [footnote omitted.]

377 U.S. at 63-64,[5] 84 S.Ct. at 1066.

While the small part the struck product had in the whole of the Safeway business was not overlooked by the Court, it was not the basis for the decision. In considering the important question of the lawfulness of peaceful picketing at a secondary site, limited to publicizing a labor dispute with a primary employer, the Court did not focus upon the minimal impact of successful picketing in determining that the picketing did not have an illegal "object" within the meaning of section 8(b)(4). A broader view of the problem of peaceful picketing directed only to the struck product was considered. The Court accordingly reversed the decision of this court when the case was before us as *Fruit and Vegetable*

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[5] Again the Court explained:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [footnote omitted.]

377 U.S. at 72, 84 S.Ct. at 1071.

Packers & Warehousemen v. *NLRB*, 113 U.S.App. D.C. 356, 308 F.2d 311 (1962). The Court held we had erred in remanding the case to the Board on the theory that the ultimate question of threat, coercion or restraint condemned by section 8(b)(4)[6] depended upon whether or not the picketing in fact had caused or was likely to cause a substantial economic impact on the secondary retailer.

III

Consider the application of *Tree Fruits* to the picketing of Alexander's gas station. The relevant facts have been set forth above in Part I. As there stated it is probable that more than 50% of Alexander's annual gross revenues are derived from the sale of products other than Bay gas. This picketing, we think, cannot reasonably be held to have been aimed at "all trade" of Alexander's under the reasoning of the Court in *Tree Fruits*. As the Court there held, picketing "confined as it was to persuading customers to cease buying the product of the primary employer," 377 U.S. at 71, 84 S.Ct. at 1071, did not fall within the area Congress clearly indicated an intention to prohibit under section 8(b)(4)(ii)(B) and, therefore, did not "threaten, coerce, or restrain" Safeway.[7] The composition of

[6] See footnote 1, *supra*, for text of the statute.

[7] This court's opinion in *Honolulu Typographical Union No. 37* v. *NLRB*, *supra*, characterizes the impact which pickets have upon persons who, though not fully in sympathy with the labor union, may be very hesitant to cross its picket lines:

> The restraint generated by the need to cross any such picket line may entirely inhibit consumers who are not whole-hearted union men but are unwilling to be readily identified as hostile or indifferent. There is no similar impact where the picketing acquiesces in the crossing of the picket line but merely urges that the consumer be selective on the inside. It is that sort of limited picketing message that *Tree Fruits* held outside the spirit of § 8(b)(4)(ii)(B). 401 F.2d at 957.

Here, however, restraint is muted, and the applicability of *Tree Fruits* strengthened by the fact that the overwhelming proportion of service station customers arrive by and conduct their transactions from their vehicles.

this statement by the Court is critically important. The Court did not say that the picketing in *Tree Fruits* did not threaten, coerce or restrain Safeway and therefore did not fall within the area Congress intended to prohibit by section 8(b)(4). The Court said that since the picketing was not conduct of the kind which Congress intended to prohibit by that provision, it followed that it did not threaten, coerce or restrain the secondary within the meaning Congress attached to the provision. It was not one of the "isolated evils" intended to be prohibited by section 8(b)(4). The Court viewed Congress as having determined that the possible loss to a secondary caused by this means of publicizing a labor dispute with the producer of the struck product, when weighed against a policy favoring the right peacefully to publicize the dispute, did not outweigh the right.

IV

The factual difference between Alexander's and the other five stations does not lead to a different legal conclusion. The economic loss due to picketing at the other stations directed against Bay gas might or might not be very severe. One does not know

how successful it would be. There is little in *Tree Fruits* to support a different conclusion with respect to the five other stations from that which we reach in Alexander's case, notwithstanding a high percentage of their gross revenues are attributable to sales of the struck product. As stated by Mr. Justice Harlan in dissenting from the Court's position in *Tree Fruits*:

> . . . it cannot well be gainsaid that the rule laid down by the Court would be unworkable if its applicability turned on a calculation of the relation between total income of the secondary employer and income from the struck product.

377 U.S. at 83, 84 S.Ct. at 1077. Mr. Justice Harlan prefaced these observations by the following:

> The distinction drawn by the majority becomes even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product. If, for example, an independent gas station owner sells gasoline purchased from a struck gasoline company, one would not suppose he would feel less threatened, coerced, or restrained by picket signs which said "Do not buy X gasoline" than by signs which said "Do not patronize this gas station." . . .

377 U.S. at 83, 84 S.Ct. at 1077. The opinion of the Court in *Tree Fruits* seems to point to no such "unworkable" standard by which to determine lawfulness. To distinguish between the stations in here applying section 8(b)(4) would be inconsistent also with the Court's reversal of our remand of the *Tree Fruits* case for Board consideration of the economic impact which the picketing actually caused or was likely to have caused.

In some situations the validity of a regulation does depend, not upon the fact of particular conduct but upon the degree of the association of the conduct with a congressional purpose. *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937). In according to employees, however, the right to publicize in a peaceful manner their dispute with a primary party by making it known at a secondary site where the primary's struck product is offered for sale, we think the Court did not consider that the lawfulness of the exercise of the right depended upon differences in the degree of the possible economic impact upon the secondary; an unlawful object was not to be imputed from the possible economic effect of the picketing if it was peaceful and directed only to the struck product. This we think is the situation even though the economic effect were predictably severe if the picketing became very successful. As the dissenting Board members stated in the present case, "the appeal did not extend beyond Bay gasoline, the struck product"; therefore, nothing in the Union's conduct "goes beyond the limits approved in Tree Fruits." With such an appeal any coercion which might grow out of the fact that sales of Bay gas represented most of the station's gross revenue is not unlawful under section 8(b)(4), for the object of the appeal is not condemned by that section. The picketing was not a signal for conduct on the part of anyone except as an appeal to the public not to purchase Bay gas.[8]

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[8] Signal picketing is peaceful picketing at the site of the secondary which is engaged in for the purpose of "signalling" to the employees of a secondary a desire that they engage in a sympathy strike. *See Electrical Workers* v. *Labor Board*,

No compulsion was exerted upon employees, or upon the public other than the communication of a desire that the public respond to the Union's request not to buy Bay gas and by so responding to aid its side in the controversy with Dow Chemical. The public was not asked to abstain from all trade with the gas station. This differentiates the case from *Honolulu Typographical Union No. 37* v. *NLRB*, *supra*, and *American Bread Co.* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969). The appeals to the public in those cases, as the courts held, called for boycotting of more than the struck product. In those "merged product" cases, it was simply not possible to "follow the struck goods" either because those goods were intangible (such as advertising) or because as ingredients in the products of the secondary (baked goods in restaurant meals) they lost their identity.

V

The Board's position has its persuasiveness. It would be more persuasive were the Board free of *Tree Fruits*. Its position is not entitled to the usual deference due an agency's construction of a statute it administers; for the case involves the appropriate application of a construction of the statute by the Supreme Court. This is a judicial function no less than an agency's. Moreover, the decision of the Supreme Court and our application of it are influenced by a rule of statutory construction which requires the courts to avoid unnecessary confrontation with the constitutional guarantee of freedom of speech:

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341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299 (1951); *National Maritime Union of America, AFL-CIO* v. *NLRB*, 342 F.2d 538, 545-546 (2nd Cir. 1965).

> The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same.

Jones & Laughlin, *supra*, 301 U.S. at 30, 57 S.Ct. at 621. In *Tree Fruits* the Court stated:

> Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable. . . . Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendement.

377 U.S. at 62-63, 84 S.Ct. at 1066.

When *Tree Fruits* was before this court, Judge Bazelon pointed out for the court the "cases which teach that when two interpretations are possible, courts must construe a statute narrowly to avoid reaching constitutional issues. We must also give full consideration to the stated desire of key legislators to avoid constitutional encroachments." 308 F.2d 311, at 317.[9]

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[9] The court held that section 8(b)(4) did not ban all secondary consumer picketing, stating:

> Viewed as a whole, the statute does not reflect Congress' intent to ban all secondary consumer picketing. What Congress has said is that it shall be an unfair labor

Mr. Justice Black, disagreeing with the Court in *Tree Fruits* as to what Congress intended—being of the view that peaceful consumer picketing of a secondary employer was intended to be proscribed as unlawful under section 8(b)(4)—would have held the statute so construed to violate the guarantees of the First Amendment, and for that reason joined the Court in setting aside the Board's order. 377 U.S. at 76, 84 S.Ct. 1063, *et seq.* Mr. Justice Harlan, with Mr. Justice Stewart, were of the opinion that neither section 8(b)(4) nor the First Amendment protected the picketing; and the Board by its limitation upon consumer picketing of a peaceful character held lawful in *Tree Fruits*, gives rise to but does not pass upon a First Amendment issue similar to that avoided by the Supreme Court,[10] and now

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> practice for a union "to threaten, coerce, or restrain any person engaged in commerce * * * where * * * an object thereof is * * * forcing or requiring any person to cease * * * selling * * * the products of any other producer * * *." Each of these terms has a meaning; each must be given effect. None can be ignored or repealed by reference to the legislative history. It is significant that when Congress wanted to outlaw picketing *per se*, it knew how to do so, as is evidenced by § 8(b)(7), which forbids a union in certain circumstances "to picket or cause to be picketed, any employer" if its object is to force him to recognize an uncertified union.
>
> As we construe the statute, it condemns not picketing as such, but the use of threats, coercion and restraint to achieve specified objectives.

Id.

[10] We note that this industry is such that if the Board's rationale is applied, a union may effectively be limited to picketing at a primary site and on the premises of a few secondaries such as Alexander's.

avoided by this court in our interpretation of *Tree Fruits*.

We think that in light of *Tree Fruits* we may not hold Congress intended by section 8(b)(4) that the exercise of the arguable First Amendment right should turn for its lawfulness upon a factor exceedingly difficult to subject to line-drawing, and as to which a union exercising the claimed right might have poor information as to where to draw the line.

The petition to set aside the order of the Board is granted, and the application of the Board for its enforcement is denied.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 74-1632

[Filed Jan. 15, 1976, Robert A. Bonner, Clerk,
United States Court of Appeals for the
District of Columbia Circuit]

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

DOW CHEMICAL COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Intervenors

JUDGMENT

Before: Bazelon, Chief Judge; Fahy, Senior Circuit Judge and McGowan, Circuit Judge

THIS CAUSE came on to be heard upon a petition filed by Local 14055, United Steelworkers of America, AFL-CIO, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, and representatives, on June 18, 1974, and upon a cross-application filed

by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 22, 1975, and has considered the briefs and transcript of record filed in this cause. On December 15, 1975, the Court being fully advised in the premises, handed down its decision granting the petition for review and denying the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the petition for review filed by Local 14055, United Steelworkers of America, AFL-CIO, to set aside the order of the Board be and it is hereby granted; and that the application of the Board for enforcement of said order of the National Labor Relations Board in said proceeding be and it is hereby denied.

/s/ David L. Bazelon
DAVID L. BAZELON
Chief Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Charles Fahy
CHARLES FAHY
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Carl McGowan
CARL MCGOWAN
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX C

Orders of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 74-1632

[Filed Feb. 4, 1976, Robert A. Bonner, Clerk,
United States Court of Appeals for the
District of Columbia Circuit]

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

DOW CHEMICAL CO., CHAMBER OF COMMERCE OF THE UNITED STATES
Intervenors

Before: Bazelon, Chief Judge; Fahy, Senior Circuit Judge and McGowan, Circuit Judge.

ORDER

On consideration of intervenors' petitions for rehearing, it is

ORDERED by the Court that intervenors' aforesaid petitions are denied.

Per Curiam

For the Court:

ROBERT A. BONNER, Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 74-1632

[Filed Feb. 4, 1976, Robert A. Bonner, Clerk,
United States Court of Appeals for the
District of Columbia Circuit]

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

DOW CHEMICAL CO., CHAMBER OF COMMERCE OF THE UNITED STATES
Intervenors

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

Intervenors' suggestions for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

For the Court:

ROBERT A. BONNER, Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
Chief Deputy Clerk

Circuit Judges Tamm, MacKinnon, Robb and Wilkey would grant intervenors' suggestions for rehearing *en banc*.

APPENDIX D

Decision and Order of the National Labor Relations Board

211 NLRB No. 59

MFJKP
D—8528
Bay City and
Midland, Mich.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 7—CC-743

Case 7—CC-756

LOCAL 14055, UNITED STEELWORKERS
OF AMERICA, AFL-CIO

and

THE DOW CHEMICAL COMPANY

and

THE CHAMBER OF COMMERCE OF THE UNITED STATES

DECISION AND ORDER

Upon unfair labor practice charges filed on March 13, 1973, by The Dow Chemical Company, herein called Dow, and on May 22, 1973, by The Chamber of Commerce of the United States against Respondent, Local 14055, United Steelworkers of America, AFL-CIO, the General Counsel of the National Labor

Relations Board, by the Regional Director for Region 7, issued a consolidated amended complaint, on May 31, 1973, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the consolidated amended complaint and notice of hearing were served on the Respondent and the Charging Parties. Thereafter, Respondent filed a timely answer denying the commission of any unfair labor practices. A hearing before an Administrative Law Judge was scheduled for June 18, 1973.

Meanwhile, pursuant to the provisions of Section 10(1) of the Act, a petition for an injunction was filed by the Regional Director for Region 7, on behalf of the National Labor Relations Board, in the United States District Court for the Eastern District of Michigan. A hearing on that petition was held on May 23, 1973, before Hon. Thomas P. Thornton, United States District Judge. Thereafter, on August 23, 1973, all parties herein joined in a motion before the National Labor Relations Board that the instant consolidated proceeding be transferred to the Board without a hearing before an Administrative Law Judge, and that the entire record consist of the formal papers, the official record in the district court proceeding including transcript and exhibits, and certain stipulated facts. On August 29, 1973, the Board granted this joint motion and transferred the instant proceeding to itself.[1] Thereafter,

[1] No further proceedings have ensued, nor has a decision been rendered in the district court.

the General Counsel, the Respondent, and the Charging Parties filed briefs.

On December 21, 1973, the Board, having determined that the instant case raised issues of substantial importance in the administration of the Act, ordered that this case be set down for oral argument before the Board. Oral argument was heard on January 7, 1974.

Upon the entire record in the case, the Board makes the following findings:

I. Jurisdiction

The consolidated amended complaint alleges and the answer admits that The Dow Chemical Company in 1972, a representative year, in the conduct of its Bay Refining Division located in Bay City, Michigan, sold in excess of $500,000 worth of products, of which goods valued in excess of $50,000 were shipped directly to points located outside the State of Michigan. The answer also admits, and we find, that The Dow Chemical Company is a person engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The consolidated amended complaint alleges and the answer admits that Harold Alexander, Inc., Rupp Oil Company, and Central Michigan Petroleum, Inc., are persons engaged in commerce within the meaning of Sections 2(6) and (7) and 8(b)(4) of the Act. In the absence of facts either in the pleadings or elsewhere in the record sufficient to prove the last-mentioned allegations, and since jurisdiction is otherwise established to our satisfaction, we need

not make any findings regarding the "commerce" status of these businesses.[2]

II. The Labor Organiaztion Involved

Local 14055, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The facts we rely on are undisputed. The Dow Chemical Company has its Bay Refining Division in Bay City, Michigan, where it produces gasoline and other products. Respondent was, at the times pertinent to this proceeding, on strike against the Bay Refining Division. Respondent picketed at six gas stations deriving their revenues largely from the sale of this gasoline, marketed under the trade name of "Bay." The picket signs asked consumer to boycott Bay gasoline.[3] All of the gas stations involved

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[2] The Dow Chemical Company being the "primary employer" herein, we assert jurisdiction on the basis of its engagement in commerce without regard to the "commerce" status of Harry Alexander, Inc., Rupp Oil Company, and Central Michigan Petroleum, Inc., who are the "secondary employers" for purposes of this case. *Sheet Metal Workers International Association Local Union No. 299, AFL-CIO, and Allen Stout, its Agent (S. M. Kisner and Sons)*, 131 NLRB 1196; *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (New Power Wire and Electric Corp.)* 144 NLRB 1089, fn. 1.

[3] A typical sign read: "Don't Buy Bay Gas." Other signs omitted the word "Gas." Our resolution of the legal effect of the picketing makes it unnecessary for us to pass upon the alleged failure of the signs to specify adequately the boycotted product.

are independent, in the sense that none is operated, either wholly or jointly, by Dow.

Three of the stations, located in Bay City, are operated by Rupp Oil Company which, in addition to operating several retail Bay gasoline stations, is the area wholesale distributor for Bay gasoline. While not owned or controlled in its day-to-day operations by Dow, the Rupp distributorship was created with the aid of Dow's endorsement as cosigner of a bank note for a loan to Rupp of $116,000. One of the conditions of this endorsement is that Dow must agree to any purchases or expenditures made with this money. Rupp's wholesale supply is maintained in tanks owned by Dow adjacent to the Bay refinery. On at least one occasion during the strike, Dow employees performed a maintenance operation on the tanks, namely, the installation of gauges. Each of Rupp's three retail gas stations in question is leased by the landowner to Dow, and subleased by Dow to Rupp Oil Company. At two of the stations, at 248 Washington Street and 2100-22nd Street, the rental Rupp pays to Dow is based on gallons of gasoline sold. The third station, at 1017 Marquette Street, is on land owned by Rupp's principal, Harold Rupp, and his wife, who lease it to Dow, which in turn subleases it to Rupp Oil Company for the same rental as provided for in the primary lease. The purpose of this leaseback arrangement does not appear. Dow owns the "Bay" insignias at all three stations, and the gas pumps at the Marquette and 22nd Street stations. At 22nd Street, it also owns a hoist, a carwasher, battery charger, racks and counters, and other personal property.

Central Michigan Petroleum, Inc., operates two of the picketed gas stations located in Midland, Michigan. Central Michigan, like Rupp, also wholesales gasoline. Also like Rupp, Central Michigan is a lessee to Dow with respect to these stations. One of them is actually owned by Dow and the other is leased to Dow and subleased to Central Michigan. The terms of neither of these leases appear in the record, except that a Dow representative testified that he thought the subleased station was rented for the same rental Dow pays. Both stations carry the "Bay" insignia.

The remaining gas station involved is operated by Harold Alexander, Inc., on Euclid Avenue, Bay City, on property owned by Harold Alexander, Inc., leased to Dow for a fixed rental, and leased back to Alexander for a rental based on its gasoline sales. Alexander also leases to Dow the Washington Street gas station which Dow subleases to Rupp Oil Company and, apparently, one of the Midland stations which Dow subleases to Central Michigan Petroleum.[4]

Among the three Rupp Oil Company stations, the one on Washington Street has gross revenues of about $280,000 a year, of which from 81 to 86 percent comes from the sale of Bay gas. It is also a General Tire dealership. The 22nd Street station grosses about $140,000, about 85 percent from Bay

[4] Central Michigan's general manager testified that the land was owned by Harold Alexander. A Dow representative testified that it was owned by a firm known as Bay General. Dow's brief to the Board cites the former testimony in presenting its version of the facts, but inadvertently states that the property was owned by Dow, leased to Alexander, and subleased to Central Michigan.

gas, and the Marquette Street station had only operated for about 6 months at the time of the hearing, and had sold $39,000 worth of Bay gas out of $40,000 in gross revenues. The Marquette station, however, leases its servicing facilities to an independent mechanic, and neither the lease rental nor the income of the mechanic (both unknown) is included in the $40,000 figure.

The two stations operated by Central Michigan Petroleum had only been in operation a few months at the time of the hearing. One had gross revenues of $68,000, of which 91 percent came from Bay gas and oil and other Dow products such a radiator sealer, brake fluid, and windshield solvent. The other station had gross revenues of $45,000, of which about 98 percent was from Dow products.

The Harry Alexander, Inc., station grosses about $1,200,000 a year. It is also a General Tire dealership. Its fuel (gas and diesel oil) sales account for 60 to 65 percent of gross revenues. This station sells gas other than Bay brand, and Alexander's owner, while at one point in his testimony estimating that Bay represented about 75 percent of his fuel sales, later stated that for the current year he did not know how much of the gas he sold was Bay. While it is not entirely clear from the record, it would appear that potential customers would not generally have known that gas other than Bay was available at the station.

It is the contention of the General Counsel and the Charging Parties that by its picketing of these independent gas stations Respondent sought to coerce their operators with an object of forcing them to cur-

tail or cease doing business with Dow, in violation of Section 8(b)(4)(ii)(B). Respondent defends its picketing by asserting that the station operators are not neutral parties entitled to protection from picketing in furtherance of a labor dispute with Dow, and that its picketing at the premises of these retailers of Dow's gasoline, even if they are neutral parties, is lawful under the *Tree Fruits* case[5] as consumer picketing aimed at Dow's product only.

A. *Neutrality of the Picketed Stations*

Where the business enterprise at which alleged secondary picketing takes place is operated with such identity and community of interests with the person having the primary labor dispute as to negative the claim that it is a neutral enterprise, we have held that it is not then the kind of third party who was intended to be protected by Section 8(b)(4).[6] Here, where there is no question of the gas stations being "allies" or "joint employers" with Dow, as those terms have been used in prior cases, Respondent would have us translate the whole complex of business relationships between the stations' operators and Dow, including the lease arrangements, into such a surrender of neutrality. The short answer to this line of argument is that the Board does not normally predicate loss of neutral status on economic interdependency alone, absent such factors as common

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[5] *N.L.R.B.* v. *Fruit and Vegetable Packers & Warehousemen, Local 760* [*Tree Fruits Labor Relations Committee, Inc.*], 377 U.S. 58 (1964).

[6] *Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Acme Concrete & Supply Corp.)*, 137 NLRB 1321, 1324.

ownership or managerial control.[7] None of the facts relied on to persuade us of the unity between Dow and each of the operators is so exceptional as to warrant, in our judgment, departing from this policy in the instant case.

B. *The Applicability of the Tree Fruits Doctrine*

The second question posed by the set of facts before us is the lawfulness of the picketing in light of the *Tree Fruits* decision, *supra*. In that case a majority of the Supreme Court held that Section 8(b)(4) does not proscribe peaceful consumer picketing which is employed only to persuade customers not to buy the struck product, as opposed to picketing to persuade consumers to cease all trading with the secondary retailer. The majority stated at one point that: "Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product." [8]

Respondent Union in the instant case argues that the majority holding in *Tree Fruits* is necessarily applicable irrespective of the extent of disruption of the retailer's business by a successful consumer boycott of the struck product. The Charging Parties and the General Counsel emphasize, on the other

[7] See *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Association, Local 418, AFL-CIO (Continental Grain Company)*, 155 NLRB 402, 403-406; *Local 379, Building Material & Excavators, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Catalano Bros., Inc.)*, 175 NLRB 459, 459-460, 469; *Drivers, Warehouse & Dairy Employees, Local No. 75 (Seymour Transfer, Inc.)*, 176 NLRB 530, 533.

[8] 377 U.S. at 70.

hand, that the Washington State apples which were the struck goods in *Tree Fruits* were an insubstantial part of the retail business of Safeway, the retailer involved, and that a boycott limited to those apples would not have discouraged consumers totally from patronizing Safeway, while such an effect is likely in the case of the gas stations involved here.

We think this factual distinction does indeed have significant legal consequences. Where by the nature of the business and of the picketing it is likely that customers who are persuaded to respect the picket signs will not trade at all with the neutral party, we in turn are persuaded that a true *Tree Fruits* situation does not exist, and that we are at the very least required to make our own independent judgment as to whether the picketing is permissible under the Act.[9] Arguably, certain *dicta* in *Tree Fruits* goes so far as to compel us to find a violation in such circumstances,[10] a point which we need not decide.

In *Tree Fruits*, the Supreme Court majority, finding that Section 8(b)(4) did not prohibit all peace-

[9] See *Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (American Bread Company)*, 170 NLRB 91, 93, enfd. 411 F.2d 147 (C.A. 6, 1969).

[10] For instance: "[W]hen consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." 377 U.S. at 72.

ful consumer picketing at secondary sites, decided that the minimal impact the picketing there would have had, if successful, upon the total business of the secondary retailer would not justify a conclusion that an object of the union was to persuade the retailer to discontinue handling the struck product to cut its losses. It was on that basis, in our opinion, that it held that the picketing in that case did not "threaten, coerce, or restrain" the retailer within the meaning of Section 8(b)(4).

Here, the situation is substantially different. We find, as we did in the *American Bread Company* case, *supra*, footnote 9, that the picketing was reasonably calculated to induce customers not to patronize the neutral parties, in this case the gas station operators, at all. Even though some of the stations involved sell tires and provide repair service, which special aspects of their business might be relatively unimpaired, most of their business is gasoline sales and minor items incidental thereto. Some, at least, would predictably be forced out of business if the picketing were successful, and all would predictably be squeezed to a position of duress, escapable only by abandoning Dow in favor of a new source of supply. It is not only the potential impact of the picketing, however, that distinguishes this case from *Tree Fruits*. It is, more importantly, the predictability of such impact that leads us to conclude that the picketing had an unlawful object.

In *Cascade Employers Association*,[11] we said that Congress did not intend to confine Section 8(b)(4)

[11] *Salem Building Trades Council, AFL-CIO (Cascade Employers Association, Inc)*, 163 NLRB 33, 35, enfd. *per curiam* 388 F.2d 987 (C.A. 9, 1968), cert. denied 391 U.S. 965.

to a strict and precise definition of terms which would limit its application in protecting neutral employers. We think that, mindful of the conclusion reached on the facts of *Tree Fruits*, fidelity to that congressional intent does not permit so niggardly an interpretation of the terms "threaten, coerce, or restrain" as would be necessary to find that these terms do not apply, within the meaning of Section 8(b)(4), to what this Respondent is doing to these gas station operators. Accordingly, we find that the picketing violated Section 8(b)(4)(ii)(B) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

Upon the basis of the foregoing findings of fact and upon the entire record in this case, we make the following conclusions of Law:

1. The Dow Chemical Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 14055, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By its picketing at the premises of Harold Alexander, Inc., Rupp Oil Company, and Central Michigan Petroleum, Inc., in furtherance of a dispute with The Dow Chemical Company, Respondent

has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local 14055, United Steelworkers of America, AFL-CIO, Bay City, Michigan, its officers, agents, and representatives, shall:

1. Cease and desist from threatening, coercing, or restraining Harry Alexander, Inc., Rupp Oil Company, Central Michigan Petroleum, Inc., or any other person, where an object thereof is to force or require any of them to cease using, selling, handling, transporting, or otherwise dealing in the products of The Dow Chemical Company, or to cease doing business with The Dow Chemical Company.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix." [12]

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by a duly authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the said Regional Director copies of the aforementioned notice for posting by Harry Alexander, Inc., Rupp Oil Company, and Central Michigan Petroleum, Inc., these companies willing, at the picketed gas stations.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. June 18, 1974.

EDWARD B. MILLER, Chairman

RALPH E. KENNEDY, Member

JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBERS FANNING AND JENKINS, dissenting:

Contrary to the views of our colleagues, we find no support in the statute, the teachings of *Tree Fruits*,[13] established Board doctrine, or the economic realities involved herein for the conclusion that the Union's consumer product picketing of six gas stations marketing Dow Chemical Company's "Bay" gasoline violated Section 8(b)(4)(ii)(B) of the Act.

The facts are uncontroverted. The Respondent was on strike against the Bay Refining Division of the Dow Chemical Company in Bay City, Michigan, which produces gasoline and related products. In furtherance of this dispute the Respondent engaged at six gas stations in picketing which urged a consumer boycott of the major product manufactured by the struck refinery—gasoline marketed by Dow under the "Bay" label.

The record is clear that the picketing of the six retail gas stations was at all times peaceful and directed only at the consuming public. The record also reveals that the picketing did not cause any employee to stop working, nor otherwise interfere with deliveries to or pickups from the picketed sites, nor in any manner obstruct customer ingress and egress. The evidence affirmatively shows that the pickets stationed themselves on sidewalk locations away from entrances or exit driveways, that they did not appear until the station opened, and that they departed before it closed. The evidence also discloses that the picketing was in conformity with

[13] *N.L.R.B.* v. *Fruit and Vegetable Packers & Warehousemen, Local 760* [*Tree Fruits Labor Relations Committee, Inc.*], 377 U.S. 58 (1964).

its avowed consumer boycott purpose in all substantial aspects and that the pickets limited their appeal to the struck product—"Bay gasoline." The legends on the picket signs generally stated: "Don't Buy Bay Gas," "Boycott Bay Gas," and "Bay Gasoline Made by Scabs."

It is undisputed that all the picketed locations sell products and services other than Dow gasoline. Indeed, the Harold Alexander Co., Inc., station sells a certain percentage of non-Dow gasoline. Moreover, Dow gasoline is clearly not merged into the nonstruck products or services so as to physically prevent the purchase of one without the other. It is possible to buy tires, car accessories, golf balls, and charcoal or have a car washed or repaired without buying Bay gasoline at the stations.

Thus, it appears that the only essential difference between the instant factual situation and that involved in the *Tree Fruits* decision is that here the Respondent is engaged in consumer picketing of a specific brand of gasoline rather than of Washington State apples, and that this gasoline in question is a much more important component of the stations' income than were the apples of Safeway's income in *Tree Fruits*.

Tree Fruits held that consumer picketing, asking customers not to buy the struck product, is lawful because it is part of, or confined to, the primary dispute. Such picketing becomes unlawful only when it extends beyond the struck product to embrace other products or other parts of the business of the person selling the struck product. The Supreme Court made this crystal clear, in defining the difference thus:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchase from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [377 U.S. at 72.]

Since Respondent's appeal did not extend beyond Bay gasoline, the struck product, nothing in its conduct goes beyond the limits approved in *Tree Fruits*.

The majority considers consumer picketing to be unlawful if "it is likely that consumers who are persuaded to respect the picket signs will not trade at all" at the picketed establishment. They rely on the Court's statement that "Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer" is unlawful (377 U.S. at 70), and perhaps also on the Court's condemnation of "consumer picketing [which] is employed to persuade customers not to trade at all with the secondary employer" in the part of the decision set out above. But this reliance is misplaced. "All trade" which

it was unlawful to shut off in *Tree Fruits* was the trade including items *other* than the struck product. The vice in appealing for such action lies not in the fact that all trade is sought to be ended, but in the fact that, where the struck product is only part of the goods sold by the picketed employer, an appeal to end all trade with him is necessarily an appeal to cease buying nonstruck products as well as the struck product. The decision plainly indicates that, whether all trade or a major fraction of it is in the struck product, an appeal not to buy the struck product is lawful. This is clear from the Court's conclusion that "when consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute." (377 U.S. at 72), and that the evil at which the statute was aimed was the use of consumer picketing:

> to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. [377 U.S. at 63.]

As the Court said in footnoting the "not to trade at all" prohibited type of picketing, the distinction is between "merely to 'follow the struck goods' and picketing designed to result in a generalized loss of

[business] . . ." (377 U.S. 64, fn. 7). And yet again in explaining this language, it drew the same distinction between "a public appeal directed only at a product which results in a decline of 25% in . . . sales of that product" and an "appeal . . . that the public cease all patronage . . ." (377 U.S. at 72, fn. 20).

The majority rests its decision principally on the ground that, because the struck product, gasoline, is so dominant and overwhelmingly important a proportion of the service stations' business, an appeal to customers not to buy it will, where it is effective, persuade customers not to patronize the service stations at all. But the Court specifically recognized this argument about degree of impact and the probability that the consumer picketing "provokes the public to stay away from the picketed establishment." (377 U.S. at 71). Indeed, Mr. Justice Harlan made this same point in his dissent. And the Court rejected this argument unequivocably, saying, "Be that as it may . . . Congress has never adopted a broad condemnation of peaceful picketing, such as that urged upon us by petitioners . . ." (377 U.S. at 71).

Apart from the effect of inducing customers to stay entirely away from the service stations, the majority concludes that because the picketing of struck apples in *Tree Fruits* would have "minimal impact" on Safeway's total business and the picketing of gasoline here (if successful) would have a major, possibly devastating, impact on the service stations' business, this increase in impact causes the picketing to violate the Act. That is, the more effective

the picketing, the greater the possibility of its being unlawful. But the Act makes no such distinction, and in *Tree Fruits* the Court, as with other arguments advanced by the majority, expressly rejected this one also. The same argument had been made by Mr. Justice Harlan in his dissent, and the court of appeals, and the Supreme Court held:

> We disagree . . . with the Court of Appeals that the test . . . is whether Safeway suffered or was likely to suffer economic loss. A violation of § 8(b)(4)(ii)(P) would not be established, merely because respondents' picketing was effective to reduce Safeway's sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller. [377 U.S. at 72-73]

The majority's reliance on *American Bread*[14] is misplaced. There the struck product was bread, the consumer picketing was of a restaurant serving the bread as part of its meals, and the appeal was to

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[14] *Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local 237, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (American Bread Company)*, 170 NLRB 91, 93, enfd. 411 F.2d 147 (C.A. 6, 1969). In agreeing with his colleagues that this picketing was violative of the Act, Member Jenkins relied solely on the fact that Local 327 failed to take precautions for allaying any misgiving that might arise concerning the picketing and further assure all parties, including customers, that its picketing was focused solely on the Employer's bread. (170 NLRB at 93, fn. 6.) Similarly, the court also relied on conduct by the picketing Union which showed that its objective was aimed at employees of secondary employers. (411 F.2d at 154-155.) These factors are not present here.

patrons not to buy the bread. Such picketing was held to be unlawful because the diners could not choose to refrain from buying the bread without also refraining from buying the entire meal, so that the nonstruck products which comprised the rest of the meal were necessarily within the reach of the picketing appeal. There is no such merger or incorporation of the struck gasoline here into any other product or service, and the consumers can readily choose not to buy Bay gas without affecting whatever other products or services might be available at the service stations. Since this distinction, the lack of any appeal necessarily affecting neutral products, is the foundation of *Tree Fruits*, *American Bread* can have no application here.[15]

How the "close confine[ment] to the primary dispute" held to make consumer picketing lawful in *Tree Fruits* becomes farther removed from the primary dispute when the struck product becomes a larger percentage of the total business of the picketed employer, the majority does not explain. Both logic and experience would lead to the opposite conclusion, that such increasing mutual interdependence between the struck supplier and the retailer would increase the primary character of the picketing. Indeed, the facts here show that the statutory concept of neutrality tends to lose its substance as the

[15] Member Jenkins has not adopted the "merged product" doctrine. See his dissents in *Honolulu Typographical Union No. 37, AFL-CIO*, 167 NLRB 1030, 1033, enfd. 401 F.2d 952 (C.A. 9, with the court deriving the secondary object in part from handbills which stated, "Do not patronize this establishment."); *Los Angeles Typographical Union No. 174*, 181 NLRB 384.

struck goods rise toward being the sole or nearly sole product handled by the retailer.[16]

[16] Thus, Rupp Oil Company which operates three of the stations involved in this proceeding is the "exclusive" wholesale distributor of Bay Refinery products. Written consent of Dow's general manager is apparently required before it can distribute products to any service station, fuel oil dealer, or other person or retailer in Bay County. It was Dow, not Rupp, who selected the site for the bulk plant from which Bay Gas is distributed to Rupp's retail outlets. The tank farm is on a site to which Bay gasoline could be delivered by direct pipeline from the adjacent Bay refinery. Dow constructed and owns the tanks, owns the property on which they are located, and during the picketing Dow used employees in the struck bargaining unit to install guages in the tanks. Furthermore, Dow not only cosigned the Rupp's bank note making Rupp's dealership possible, but it approves the amount and type of Rupp's insurance and monetary reserves and maintains the right to examine Rupp's balance sheet. The three Rupp Oil stations operate retail sites which are all leased or subleased from Dow, and Dow owns the pumps and a long list of property used by the stations. The rent at two of the stations is based on the gallons of Bay Gas sold.

Similarly, Central Michigan Petroleum, Inc., operates two of the picketed gas stations. Like Rupp, Central leases the stations from Dow. One of the stations is actually owned by Dow (Saginaw station) and the other is leased to Dow and subleased to Central Michigan. Like Rupp, Central Michigan is also a wholesale distributor of Bay Refining products, although the extent of Dow's control does not appear to have been reduced to a written distributorship agreement. The arrangement further raises questions not only of the economic dependency of Central Michigan on Dow, but whether the Saginaw station is in fact a "primary" site on the basis of the Board's conventional legal standards. (See *International Brotherhood of Teamsters, Chauffeurs, Warehousemen*

Our colleagues assert that, in addition to potential impact, "it is, more importantly, the predictability of such impact" which warrants finding an unlawful object. But if the impact is permissible, as they seem to concede and as *Tree Fruits* plainly holds, the probability of the impact can hardly be relevant. Are unions required to picket only known antiunion neighborhoods, or to picket only very high-priced stores whose customers might be expected to have little interest in unions? Activity which is sufficiently primary in character may lawfully be carried on, even if the effect is to close down the employer, and regardless of whether this outcome is likely or remote. The activity does not become less primary by reason of any such effect. Since

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and Helpers of America, AFL-CIO (Alexander Warehouse & Sales Co.), 128 NLRB 916.)

Finally, Harold Alexander, Inc., the sixth station picketed, subleases its site from Dow pursuant to a fixed rental on property owned by Alexander and leased by Dow. On two occasions Dow paid for the replacement or repair of underground tanks and has also assumed half the cost of certain card material. The rental, like the two Rupp stations above, is also based on the sales of gasoline. Alexander purchases an indefinite amount of gasoline other than the Dow brand, and there is some question from the available facts whether Alexander has complete freedom to make unlimited outside purchases.

These facts are of a type common where a retailer deals solely or principally in products supplied by another; they are recounted here not to show an "agency" or other relation between the supplier and the retailers, but to show the economic realities underlying their relation. Obviously, these economic circumstances pose an issue whether neutrality can have any substantial meaning where such interdependence exists.

Tree Fruits held the picketing here to be sufficiently primary in character to be lawful, it does not become less lawful because it reaches a major and possibly decisive portion of the employer's business, and thus increases the likelihood that the employer may close down entirely.

A constitutional problem lurks within the majority's view. The picketing here was peaceful, limited to the struck product, did not interfere with deliveries or customer access, did not induce or attempt to induce the service station employees to interrupt their work, and involved no means proscribed by the statute. That is, the picketing here was no more than speech concerning the Union's primary dispute over the production of Bay gasoline. To prohibit it, as does the majority, "might collide with the guarantees of the First Amendment," as the Court noted in *Tree Fruits*. (377 U.S. at 63.)

In short, the majority extracts and fastens upon the Court's phrases such as "not to trade at all" and "shut off all trade," and gives them a literal and rigid meaning quite different from that made clear by the context and by the circumstances and issues which the Court in *Tree Fruits* addressed. This meaning is that espoused in the *Tree Fruits* dissent and by the court of appeals which the Supreme Court reversed, a meaning expressly and repeatedly rejected by the Court. Our colleagues commit the same error which the Court there cautioned against, ignoring "the rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." (377 U.S. at 72.) Thus the majority, mired in the remembrance of things past, is now repeating

the mistake which led to the Board's original error in *Tree Fruits.*

For these reasons, we dissent, and would dismiss the complaint.

Dated, Washington, D.C. June 18, 1974.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT, by picketing their gas stations, threaten, coerce, or restrain Harry Alexander, Inc., Rupp Oil Company, Central Michigan Petroleum, Inc., or any other person, where an object thereof is to force or require any of them to cease using, selling, handling, transporting, or otherwise dealing in the products of The Dow Chemical Company, or to cease doing business with The Dow Chemical Company.

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated ——— By ———
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulvard, Detroit, Michigan 48226, Telephone 313—226-3200.

Supreme Court, U. S.
FILED
AUG 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NOS. 75-1858
75-1609
~~75-1501~~
75-1521

NATIONAL LABOR RELATIONS BOARD,
THE CHAMBER OF COMMERCE OF THE
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THE DOW CHEMICAL COMPANY,
Petitioners,

v.

LOCAL 14055, UNITED STEELWORKERS
OF AMERICA, AFL-CIO,
Respondent.

On Petitions For A Writ Of Certiorari To The
United States Court of Appeals For
The District of Columbia Circuit

SUGGESTIONS OF MOOTNESS

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SUGGESTIONS OF MOOTNESS

The undersigned counsel represented respondent, Local 14055, United Steelworkers of America, AFL-CIO, in all the proceedings below. Inasmuch as that labor organization no longer exists, the only response we can properly make to the three petitions for certiorari filed herein is to bring the facts to the Court's attention and to explain why we believe that the nonexistence of the respondent moots this controversy.

I. The Facts Relating to the Dissolution of Local 14055.

As established in decisions of the National Labor Relations Board and the courts and by the affidavit and supporting documents[1] included in the appendix to these

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1. The Appendix to these Suggestions of Mootness will be cited as "App." Citations to "Pet. App." refer to the appendix to the petition for writ of certiorari in No. 75-1521 filed by the Dow Chemical Company.

Suggestions, the facts relating to the background and dissolution of Local 14055, United Steelworkers of America, AFL-CIO (herein "respondent" or "Local 14055") are as follows.

During all of its existence, Local 14055 or its pre-Steelworker[2] predecessor in the International Union of District 50, Allied and Technical Workers of the United States and Canada (Ind.) represented the production and maintenance employees of the Dow Chemical Company, Bay Refining Division refinery (herein "Dow" or "the Company"), located in Bay City, Michigan (App. 2a). Its membership consisted *entirely* of these Dow employees, and the employees of no other employer or facility either belonged to or were represented by Local 14055 (*id.*).

The conduct at issue in the current case stems from a labor dispute between respondent and Dow which commenced in February of 1972 when the employees, then represented by respondent's District 50 predecessor, went on strike (App. 2a-3a). The strike turned out to be unsuccessful. Dow continued operations during the strike, hiring replacements to perform the work of strikers (App. 3a). As of April 13, 1973, there was a full complement of employees on hand at the plant.[3]

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2. In 1972, District 50 affiliated with the United Steelworkers of America. That affiliation was the subject of some litigation and was eventually accomplished under the supervision of the Secretary of Labor. See, *Cefalo v. Moffett,* 333 F. Supp. 1283 (D.D.C. 1971), *modified on appeal,* 449 F.2d 1193 (D.C. Cir. 1971), *on remand,* ..... F. Supp. ....., 67 CCH Labor Cases ¶ 12,468 (D.D.C. 1972).

3. The facts relating to Dow's withdrawal of recognition are as found by the NLRB in *The Dow Chemical Company,* 216 NLRB No. 16 (1975).

Included in their number were eighty-two striker replacements and sixty-one employees who had abandoned the strike and returned to work. At that time, only sixty-four employees[4] remained on strike, and they had been on strike for more than a year and had, therefore, lost the right to vote in any NLRB election in this bargaining unit (App. 3a-4a). Approximately seventy percent of the employees at work in early April of 1973 signed a petition seeking disaffiliation with the Union. Based on these facts, the Company withdrew recognition on April 15, 1973. Since that date, the employees have been unrepresented.

The last collective bargaining session between the parties occurred on January 12, 1973 after which the Union requested no further meetings. On September 12, 1973, all strikers offered to return to work. There has been no picketing of any kind since mid-September of 1974 (App. 3a).

The Company's withdrawal of recognition as well as certain other conduct was challenged in unfair labor practice proceedings. Ultimately, however, the Board ruled that Dow did not commit a violation of the National Labor Relations Act when it terminated the bargaining relationship. *The Dow Chemical Company,* 216 NLRB No. 16 (1975).

The effect of this NLRB decision was to confirm the loss of the Local's right to represent employees of the Dow refinery. Moreover, it was then apparent that there was little if any support for Local 14055 among the employees in the bargaining unit which meant that a representation election could not be won (App. 3a-4a).

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4. This number was thereafter reduced by additional defections (App. 3a).

These facts made it clear that the cause was lost and that there was no chance to regain the right to bargain for these employees. Indeed, in the staff representative's view, further efforts were both futile and contrary to the best interest of the Union's members. Accordingly, he recommended that Local 14055 be placed under administratorship as is standard procedure in the Steelworkers[5] when a local union is ultimately headed for extinction (*id.*). As of June, 1975 the only open question was whether or not review would be sought of the Board's decision absolving Dow (*id.*).

Pursuant to the recommendations of the staff representative and the International Director for the district encompassing Bay City, Michigan, the International, exercising its constitutional powers, imposed an administratorship on Local 14055 (App. 4a-9a). Thereafter, hearings on the administratorship were held by an International Commission. The Commission, after reviewing briefly the long history of the strike, including the fact that more than one-half of the Local's members had abandoned the effort and that the Steelworkers had lost all representation rights, concluded that the Local should remain under administration in order to safeguard the Union's assets and because of the pendency of litigation (App. 9a, 16a-18a).[6] In October of 1975, the International Executive Board voted to adopt the Commission's report (App. 10a, 21a).

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5. The United Steelworkers of America, AFL-CIO is referred to herein as "Steelworkers" or "International."

6. The only litigation discussed in the course of the hearings on the administratorship involved the NLRB decision in the refusal to bargain case against Dow (App. 9a).

After the imposition of an administratorship, respondent conducted no further meetings and engaged in no collective bargaining, organizing or other activities. Except for steps taken to wind up its affairs, the only function Local 14055 served in the fall and winter of 1975 was to collect and turn over premiums so that some former employees of Dow could obtain group insurance coverage from Blue Cross-Blue Shield (App. 10a).

In February or March of 1976, however, the group policy was cancelled by the insurer on the ground that the group had become too small. In fact, it had dwindled to only three members (*id.*). There was now no reason for the Local to continue in existence. Accordingly, the administrator, in early May of 1976, recommended to the District Director that respondent's charter be lifted (*id.*). His recommendation was based on the facts that (a) the Local had lost the bargaining rights for the only plant in its jurisdiction and it had been decided not to seek review of the NLRB's ruling in the matter; (b) there was no chance of regaining such rights; (c) the preliminary steps necessary for dissolution had been taken, including the payment of all bills and (d) there no longer was a need to keep the Local in existence for group insurance purposes (App. 11a).

For substantially the same reasons, the Director in turn made this same recommendation to the International Executixe Board which voted to cancel the Local in early May of 1976 (App. 11a, 22a-24a). Immediately thereafter, the administrator completed the formalities attendant to dissolution of the Local. The only assets in the Local's treasury, unused strike funds, were transferred back to the International Strike and Defense Fund

whence they came and Local 14055, the sole respondent in this case, ceased to exist (App. 11a-12a).

II. Dissolution of Local 14055 Moots This Controversy.

There was never more than one respondent in this case, Local 14055. The Board's order, enforcement of which was denied in the court below, would require that Local 14055 cease and desist from threatening and coercing certain named employers where the object thereof is to cause such employers to cease doing business with Dow. In addition, the Local is required to post a prescribed notice at its business office and meeting halls and furnish the Board's Regional Director with proof of compliance (Pet. App. 38a-39a). After the court of appeals denied enforcement of the Board's order, Local 14055 went out of existence. That post-decision change in circumstances, we respectfully suggest, renders this case moot. The Local has passed from the scene and therefore cannot defend its position here; moreover, even if this Court were to grant certiorari, reverse the court below and decree enforcement of the Board's order, it would be doing a vain act for the non-existence of respondent makes the cease and desist order meaningless and the posting requirement impossible to perform.

Almost thirty years ago, this Court laid down the following general rule to guide reviewing courts in dealing with NLRB cases where, following the Board's decision, circumstances arise which cast doubt on the advisability of enforcing the Board's order:

> "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration.

> *For example, where the order obviously has become moot, the court can deny enforcement without further ado;* but where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order." (Emphasis added.) *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428, 67 S.Ct. 1274, 1281 (1947).

Typically, mootness becomes an issue in cases involving employer respondents when, following the Board's decision and while review is still pending in the court of appeals, the employer goes out of business, or permanently closes the plant involved in the proceeding. In these circumstances, and provided, of course, that a functioning employer is necessary for compliance, i.e., the remedy includes a cease and desist order, a reinstatement order or a bargaining order, the courts generally dismiss the petition as moot if presented with evidence establishing cessation of the business. *N.L.R.B. v. Armitage Sand and Gravel,* 495 F.2d 759 (6th Cir. 1974) (*per curiam*); *N.L.R.B. v. McMahon, d.b.a. McMahon's Sales Co.*, 428 F.2d 1213 (9th Cir. 1970) (*per curiam*). If not, they remand the case to the Board to determine whether the plant has been in fact closed or sold. *N.L.R.B. v. Gilmore Down River Chevrolet, Inc.*, 65 LRRM 3151, 56 CCH Labor Cases ¶ 12,139 (6th Cir. 1967) (*per curiam*); *N.L.R.B. v. Schnell Tool & Die Corporation,* 359 F.2d 39 (6th Cir. 1966); *N.L.R.B. v. Grace Co.*, 184 F.2d 126 (8th Cir. 1950); *N.L.R.B. v. Reynolds Corp.*, 155 F.2d 679 (5th Cir. 1946) (*per curiam*), 168 F.2d 877 (5th Cir. 1948) (*per curiam*). In none of these cases, however, did the court put the matter off until the compliance stage or decide the merits, as is suggested by the NLRB in its current petition (page 14). That procedure, as one court so aptly observed, "puts

the proverbial cart before the horse." *N.L.R.B. v. Schnell Tool & Die Corporation, supra,* 359 F.2d at 44. What the Board in effect seeks is a decree of enforcement before it has been shown that there is a functioning local union against which such a decree could in fact be enforced. (*id.*).

The facts here make out an even stronger case for mootness than those cited above. To begin with, the changed circumstances here arose not during the pendency of proceedings in the court of appeals but after that court had denied enforcement of the Board's order.[7] Second, in marked contrast to the respondent employers in the above cases, each of which sold or shut down all or part of its facilities but continued existence in some form, Local 14055 in this case passed from the scene altogether. Third, the Board orders in each of the above cases contained a "successors and assigns" provision notably lacking from the order issued by the Board in the present case.

The Board's reliance on *Southport Petroleum Co. v. N.L.R.B.*, 315 U.S. 100, 62 S.Ct. 452 (1942), *r'hrg. denied*, 315 U.S. 827, 62 S.Ct. 637 (1942) is misplaced. There, the Board's order contained a back pay award which, though it sold the business, could have been carried out by the respondent corporation, an ongoing entity; moreover, it appeared that the purchaser of the business may not have been the distinct entity it was claimed to be and thus might have been obligated to carry out the prospective features of the award. In addition, the Board's order ran not only to the respondent but to its successors and assigns.

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7. The essential facts were called to the attention of the Solicitor General months before the Board filed its petition for certiorari. See Petition at 14 and Appendix A thereto.

None of these facts is present in this case. The Board's remedy does not require back pay but calls for a cease and desist order.[8] Enforcement of such an order against "Local 14055" would be meaningless. Enforcement against the International would be a violation of due process inasmuch as the International was neither a party respondent to the complaint nor named in the charges filed by Dow and the Chamber of Commerce. The Board can hardly require the International to cease and desist from conduct it was never charged with. Nor, finally, can the International be held responsible for the conduct of a constituent local merely because it is the parent organization. *United Bro. of Carpenters, etc. v. N.L.R.B.*, 286 F.2d 533, 538-539 (D.C. Cir. 1960); *N.L.R.B. v. Local 1016, United Bro. of Carpenters, etc.*, 273 F.2d 686, 688 (D.C. Cir. 1960); *Meat Cutters and Butcher Workmen, Local P-575 (Iowa Beef Packers, Inc.)*, 188 NLRB No. 5 (1971). Indeed, the Board, in its petition for certiorari, does not assert, as it could not, that the International is the "successor" to the Local for enforcement purposes. Instead, the Board merely questions, inexplicably, the *de facto* existence of the Local.

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8. The distinction between currently enforcible orders such as back pay awards, on the one hand, and cease and desist or bargaining orders, on the other, has been noted by several courts. *N.L.R.B. v. Kostilnik*, 405 F.2d 733 (3d Cir. 1969) (*per curiam*); *N.L.R.B. v. Grace Co., supra; N.L.R.B. v. Dixon*, 184 F.2d 521 (8th Cir. 1950); *N.L.R.B. v. Reynolds Corp., supra.* Similarly, the fact that there were grave questions involving successor corporations is what persuaded the court to grant enforcement of the Board's order in *Cap Santa Vue, Inc. v. N.L.R.B.*, 137 U.S. App. D.C. 395, 424 F.2d 883 (D.C. Cir. 1970).

Suggestions of Mootness.

Sometime ago the Fifth Circuit cautioned that "it [is] futile to try a hotly contested case for the purpose of making an inoperative decree." *N.L.R.B. v. Reynolds Corp., supra,* 155 F.2d at 682. It would be difficult to write a more apt description of the present case.

In closing, we note our agreement with the Board's obsevation that the question posed here is an important one.[9] (It was also important in 1964 when this Court decided the same question in the *Tree Fruits* case).[10] But that is one more reason why the matter ought to be presented to this Court by live protagonists from both sides. If, as the Board states in its petition (page 13), there are a half dozen pending cases which raise the issue, there will be ample future opportunity for this Court to hear the issue, if it wishes to do so, in the context of a live controversy rather than a dead one.

III. Conclusion

For the reasons set forth above, the petitions for certiorari filed in this case should be dismissed as moot.

Respectfully submitted,

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9. Because of its importance to all trade unions, it is likely that some of them will seek to participate as *amicus curiae* should the Court disagree with us and grant certiorari in this case.

10. *N.L.R.B. v. Fruit and Vegetable Packers & Warehousemen, Local 760 [Tree Fruits Labor Relations Committee, Inc.]*, 377 U.S. 58, 84 S.Ct. 1063 (1964).

APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NOS. 75-1858
75-1609
75-1501

NATIONAL LABOR RELATIONS BOARD, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and THE DOW CHEMICAL COMPANY,
Petitioners,
v.
LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent.

COMMONWEALTH OF PENNSYLVANIA
County of Allegheny } ss.:

Affidavit of George B. Watts

GEORGE B. WATTS, being first duly sworn, deposes and says as follows:

1. My name is George B. Watts and I am currently employed as a staff representative by the United Steelworkers of America, AFL-CIO. I have held this position since March of 1966. My current business address is 1104 South Madison, Bay City, Michigan 48706. I have worked out of the Union's Bay City, Michigan office since August of 1967.

2. As a Steelworker staff representative, my duties included the servicing of as many as thirteen local

unions in the Bay City-Midland, Michigan area. In August of 1972, the International Union of District 50, Allied and Technical Workers of the United States and Canada (Ind.) merged with the United Steelworkers of America, AFL-CIO. With the merger, I began servicing those District 50 local unions which represented employees of the several Dow Chemical Company plants and one Dow-Corning Corporation plant, all in the Bay City-Midland, Michigan area. Local 14055 was one such local union.

3. Unless otherwise indicated, I have direct personal knowledge of the matters set forth in this Affidavit. As to those matters of which I do not have direct personal knowledge, my testimony is based upon (a) facts I learned as administrator of Local 14055 by examining the Local's books and records and (b) my knowledge of the procedures of the United Steelworkers of America, AFL-CIO which I gained over the years as a staff representative.

4. My examination of the books and records of Local 14055 revealed that in the Local's history of slightly more than twenty years, its membership has been confined always to the production and maintenance employees of Dow's Bay City refining facility, and it has never represented, for purposes of collective bargaining, the employees of any other employer.

5. In February of 1972, following expiration of the most recent collective bargaining agreement, Local 14055, International Union of District 50, Allied and Technical Workers of the United States and Canada (Ind.) commenced a strike against the Dow Chemical Company's Bay City Refinery Division over the terms of a new agreement. In August of 1972, Local 14055 became

affiliated with the United Steelworkers of America through the merger of the parent labor organizations. The Local continued the strike following the merger.

6. The strike proved unsuccessful. Thus, the Company continued operations throughout the strike, hiring replacements for the strikers. The strikers themselves began abandoning the strike in October of 1972. By April of 1973, a majority had given up and returned to work. Thereafter, strikers continued to filter back to work for Dow, others retired, and still others moved away from the Bay City area. By January of 1975, the strike had been abandoned by all but a few individuals numbering no more than six.

7. On September 12, 1973, Local 14055 sent a telegram to the Company which, in relevant part, read as follows:

> "The United Steelworkers of America, AFL-CIO, Local 14055 hereby offers to return all striking employees involved in the work stoppage at the above facility to work immediately. This offer is being made on behalf of all striking employees and is unconditional."

8. As for picketing itself, by the winter of 1973, strike activity by Local 14055 had fallen off considerably. From then until August of 1974, it occurred only sporadically, less than once a week on the average. Picketing by Local 14055 ceased entirely in mid-September of 1974 and has never resumed.

9. In January of 1975, the National Labor Relations Board handed down its decision upholding Dow's withdrawal of recognition of the Union. *The Dow Chemical Company,* 216 NLRB No. 16. By then, Local

14055 had no support among the refinery workers actually employed by Dow, and under the National Labor Relations Act, the strikers, having been out for more than a year, had no right to vote in any NLRB election. These facts convinced me that Local 14055 had lost the strike and had no chance to regain bargaining rights on behalf of Dow refinery employees. I also became convinced that further expenditures on behalf of this lost cause were inimical to the interests of the members.

10. In late May or early June of 1975, I telephoned Charles G. Younglove, Director of District 29, United Steelworkers of America, AFL-CIO ("International") the geographic subdivision of the International in which Local 14055 was located. I reviewed the facts set forth above with him and recommended that the Local be placed under administratorship. This is the usual course taken when it appears that a local is headed for extinction. It is done as a precautionary measure to safeguard the interests of the members and the assets of the local pending dissolution. At that time, the only "open" issue under consideration was whether or not to appeal the Board's decision in favor of Dow in 216 NLRB No. 16. These were the reasons I gave for recommending the imposition of an administratorship over Local 14055.

11. On June 2, 1975, pursuant to the provisions of Article IX, Section 1 of the International Constitution, Director Younglove sent a telegram to I. W. Abel. President of the International, requesting that an administrator be placed over Local Union 14055 and recommending me to serve as administrator "to protect the interests of the Local Union members and International Union, including pending lawsuits." Director

Younglove also recommended termination of all expenditures on behalf of the strike. I was served with a copy of the telegram.

12. Over the course of the next few days, President Abel, acting pursuant to the provisions of Article IX, Section 1 of the International Constitution, polled the members of the International Executive Board on this request. The poll was conducted by letter, a sample copy of which is attached to this Affidavit as Exhibit A.

13. Article IX, Sections 1 and 2 of the International Constitution read as follows:

"ARTICLE IX

Suspension or Revocation of Local Union Charters

"Section 1. In the event the International President shall have reason to believe that any Local Union is failing to comply with any provision of the Constitution, or that action may be required for one of the purposes specified in the following paragraph, the International President may, unilaterally or at the request of officers or members of the Local Union, institute proceedings, with due notice of the basis therefor and of a hearing before any member or members of the International Executive Board or representative or representatives designated by the International President. The Local Union shall be afforded a full and fair hearing consistent with, to the extent applicable, the procedures for conducting hearings under Article XIII. Upon the basis of the hearing the International Executive Board is authorized to render a decision, dismissing the proceedings, suspending or revoking the charter of any

such Local Union, or directing such other action as may be necessary to secure compliance with the Constitution. The International Executive Board may act at a meeting or by means of a mail or telegraphic poll.

"Included in the other action which the International Executive Board may direct are the removal, by it or by the Administrator provided for below, of all or any of the Local Union Officers, grievance or other committee members or stewards, and appointment of an Administrator over the affairs and property of any such Local Union for any of the following purposes: (a) correcting corruption or financial malpractice, (b) assuring the performance of collective bargaining agreements or other duties of a bargaining representative, (c) restoring democratic procedures, or (d) otherwise carrying out the legitimate objects of the International Union or such Local Union.

"If the decision of the International Executive Board on the report and recommendations of the hearing commission is rendered by means of a poll when it is not in session, the matter shall be considered again at the next meeting of the International Executive Board following request for such consideration by an aggrieved party provided such request is filed with the International Secretary-Treasurer within thirty (30) days after the decision is made known to the Local Union.

"Notwithstanding anything to the contrary herein, in case of emergency, where in the opinion of the International President the best interests of the International Union or Local Union require, the International President is empowered to suspend officers of, and establish an administratorship over, the affairs and property of a Local Union prior to notice and hearing. In such cases notice shall be given and a hearing as specified above shall be conducted within sixty (60) days following the emergency action.

"The Local Union shall be notified of the time and place of any meeting of the International Executive Board at which the Local Union's status will be considered. The parties shall have the right to appear before the International Executive Board at such meeting. The International Executive Board may affirm, reverse or modify the action of the International President and shall render its decision as soon as practicable following such hearing.

"The decision of the International Executive Board may be appealed to the next International Convention, provided that notice of the appeal is filed with the International Secretary-Treasurer within thirty (30) days after the decision is made known to the Local Union. Pending the appeal the decision of the International Executive Board shall remain in full force and effect. The International Convention may affirm, reverse or modify the decision of the International Executive Board.

"In the event that an Administrator is appointed for a Local Union, the Administrator shall take full charge and conduct all the affairs of the Local Union until the International Executive Board determines that the Local Union is capable of conducting its own affairs in conformance with the Constitution and policies of the International Union and by-laws of the Local Union. The Administra-

tor shall have the right to demand and receive in the name of the International Union, and the Local Union Officers shall have the obligation to turn over, the charter and all books, records, monies, assets and property of the Local Union, to be held in trust for the Local Union and to be used and expended only in the proper conduct of its affairs. The Administrator shall have the right to replace officers, grievance or other committee members or stewards removed by the International Executive Board or the Administrator, by appointing temporary officers, grievance or other committee members or stewards.

"All officers, grievance or other committee members or stewards, incumbent or temporary, shall function under the supervision, direction and control of the Administrator. The International President shall have the right, with or without cause, to remove or replace the Administrator at any time.

"It shall be the policy of the International Executive Board to terminate an administratorship as soon as it deems practicable under all the circumstances. When the International Executive Board determines to restore the autonomy of an administered Local Union, the Administrator shall, prior to such restoration, be responsible for conducting an election, in accordance with the applicable provisions of the Constitution and policies of the International Union and by-laws of the Local Union, to fill vacant offices and other elective positions vacated on account of removal or departure of the former elected incumbents.

"Sec. 2. In the event a mill or plant, which constitutes the sole jurisdiction of a Local Union, is abandoned, the International Secretary-Treasurer, with the consent of the International Executive Board, may revoke the charter of said Local Union."

14. A majority of the Executive Board voted to approve this request for appointment of an administrator. I was appointed by International President Abel by letter dated June 9, 1975. A true copy of this letter is attached to this Affidavit as Exhibit B. At approximately the same time, the officers of Local 14055 were notified of their removal. A sample copy of the notice is attached to this Affidavit as Exhibit C.

15. Also pursuant to Article IX, on June 19, 1975, a Commission was appointed by the International to conduct an investigation into the administratorship of Local Union 14055. After due notice to the officers and members of Local Union 14055, the Commission conducted a hearing in Bay City, Michigan on June 25, 1975 and again on July 16, 1975. I was present at both hearings. Whatever discussion there was of pending litigation at either of those hearings was concerned exclusively with the question of whether or not the Union should seek review of the NLRB's decision dismissing the refusal to bargain complaint against Dow. Some of the Local Union officers and members were strongly in favor of such an appeal.

16. On September 18, 1975, I received a report of the International Commission dated September 10, 1975. A copy of the report is attached as Exhibit D. Accompanying the report was a notice advising the recipients that the case would be heard by the International Executive Board at its meeting on October 20, 1975. A true copy of notice is attached as Exhibit E.

17. On October 28, 1975, I received a letter dated October 23, 1975 from Walter J. Burke, International Secretary-Treasurer advising the recipients that the report and recommendations of the Commission had been adopted by the International Executive Board. A true copy of this letter is attached hereto as Exhibit F.

18. From August of 1975 until the Local's charter was revoked in May of 1976, there were no membership meetings of Local 14055, no collective bargaining or organizing activities and, indeed, no activity of any kind except the steps I was taking to wind up the affairs of the Local and conserve the Local's assets. During some of this period, the Local did continue to serve as a Blue Cross-Blue Shield "group" consisting of former Dow employees whose insurance coverage had been terminated by the Company. These former employees paid the premium to Local 14055, and the Local in turn remitted them to Blue Bross-Blue Shield. This practice ceased in February or March of 1976 when Blue Cross-Blue Shield informed me that it was cancelling the group policy on the ground that the group was too small. By then, it had dwindled down to three.

19. In April of 1976, local union elections were conducted throughout the United Steelworkers of America, AFL-CIO. Because its future was doubtful to say the least, and there was no conceivable reason for lifting the administratorship, I decided to hold no election of officers in Local 14055.

20. In early May of 1976, I had another telephone conversation with Director Younglove concerning the fate of Local 14055. I told him there was no reason for the Local to continue in existence. In support of my conclusion, I listed the following facts:

(a) The Local had long since lost the right to bargain for Dow employees as a consequence of the NLRB's decision and we had concluded, after consulting counsel, that review of that decision would not be sought in the courts.

(b) There was no chance of regaining bargaining rights for the Dow refinery because the Local had virtually no support among the employees.

(c) All bills had been paid and the other administrative steps preliminary to dissolution attended to.

(d) The Blue Cross-Blue Shield group policy had been cancelled.

21. By letter dated May 7, 1976, a copy of which was sent to me and is attached as Exhibit G to this Affidavit, Director Younglove wrote Walter J. Burke, Secretary-Treasurer of the International, recommending that the charter for Local 14055 be revoked and its existence formally terminated.

22. Between May 11-May 13, the International Executive Board voted to approve Director Younglove's recommendation. On May 17, 1976, I received a letter dated May 13, 1976 from International President I. W. Abel advising me that the International Executive Board had voted to terminate the tenure of the administratorship and cancel Local Union 14055. I was instructed to complete the necessary government reports. A true copy of the May 13 letter is attached hereto as Exhibit H.

23. Immediately upon receiving President Abel's letter, I completed the required government reports (LM-15 and LM-16) and returned them to the International, as instructed, that same day. Thereafter, a

final audit of the books of Local 14055 was conducted by an International auditor and the remaining assets of the Local, consisting entirely of unused strike funds, were returned to the International Strike and Defense Fund.

24. Local Union 14055 did not own any real property and whatever small items of office equipment it owned were of no value and were scrapped. No labor organization succeeded to the bargaining rights which had been held by Local 14055 inasmuch as those rights had been extinguished as a result of the NLRB's decision. Local 14055 no longer exists.

I have read the foregoing Affidavit consisting of twenty-four (24) paragraphs and swear that the contents thereof are true and correct to the best of my knowledge and memory.

GEORGE B. WATTS

Subscribed and sworn to before me this 27th day of July, 1976.

JOAN M. RICH
Notary Public
My Commission Expires July 20, 1979
Pittsburgh, Allegheny County, Pa.

Exhibit A

United Steelworkers of America
AFL-CIO • CLC
Five Gateway Center, Pittsburgh, Pa. 15222

Phone: (412)562-2400

June 3, 1975

USA, June 6, 1975. Rec'd-Bay City

Charles Younglove, Director
USWA District 29
7000 Roosevelt Street
Allen Park, Mich. 48101

Dear Sir and Brother:

The following received from Director Younglove:

> "Request an Administrator be placed over the Dow Chemical Company, (Bay Petro Plant) Bay City, Michigan, Local Union 14055. Recommend George B. Watts be appointed Administrator over Local Union 14055, to protect the interests of the Local Union Members and the International Union, including pending law suits."

The International Officers recommend approval of this request.

Appendix.

Please indicate your vote of approval or disapproval and return the original copy with your signature for our records in the enclosed envelope. Please retain copy for your file.

Sincerely your,
I. W. ABEL
President

☒ Approved CHARLES G. YOUNGLOVE
☐ Disapproved

cc: Geo. Watts BC
LU 14055 Adm file
Aydelotte.
Norma

Received June 5, 1975.
District 29, Allen Park, MI

Appendix.

Exhibit B

United Steelworkers of America
AFL-CIO • CLC
Five Gateway Center, Pittsburgh, Pa. 15222

June 9, 1975

USA, June 11, 1975. Rec'd-Bay City

Mr. George B. Watts, Staff Representative
USWA District 29
1104 S. Madison Avenue
Bay City, Michigan 48706

Dear Sir and Brother:

This is to officially notify you that all the officers of Local Union 14055, United Steelworkers of America, have been relieved of their duties and you have been appointed Administrator over the affairs of this Local Union.

Please call at the Peoples National Bank and Trust Company, Bay City, Michigan 48706, where this Local Union has an account and sign the necessary signature cards.

We are enclosing Government Report Form LM-15 to be completed by you and returned to this office. Completed Form must include Statement of Assets and Liabilities as of date of Administrator's appointment; this information should be made available to you by the International Auditor who has been advised to make an Initial Audit of the Local Union's records.

Sincerely yours,
I. W. ABEL
President

cc: Charles Younglove, Director

Appendix.

Exhibit C

United Steelworkers of America
AFL-CIO • CLC
Five Gateway Center, Pittsburgh, Pa. 15222

June 10, 1975

USA, June 12, 1975. Rec'd-Bay City

Mr. Raymond I. Arnot
USWA Local Union 14055
3132 Old Kawkawlin Road
Bay City, Michigan 48706

Dear Sir and Brother:

To assure the performance of collective bargaining agreements or other duties of a bargaining representative, Local Union 14055 is being placed under an Administrator and all the officers are hereby relieved of their duties.

This is to officially notify you that as of today, you are relieved as President of Local Union 14055.

Mr. George B. Watts has been appointed Administrator and you are hereby instructed to turn over to him all books, records, property and effects of Local Union 14055.

The imposition of an Administratorship is standard procedure in this type of case. It should not be viewed as in any way reflecting upon your performance as an officer of the Local Union.

Sincerely yours,
I. W. ABEL
President

cc: Charles Younglove, Director
George B. Watts, Administrator

Appendix.

Exhibit D

United Steelworkers of America
District 29
Bay City Sub-District Office
1104-1106 South Madison Avenue
Bay City, Michigan 48706
Telephone (517) 893-4591

September 10, 1975

U.S.W.A., Sept. 12, 1975. Pittsburgh, Pa.

Mr. Walter J. Burke, Secretary-Treasurer
United Steelworkers of America, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, Pa. 15222
Re: Investigation - Administratorship
Local Union 14055, District 29,
United Steelworkers of America

Dear Sir and Brother:

This is our report on the investigation of Local Union 14055, USWA, AFL-CIO-CLC, under administration. Letters were sent out to all officers as directed. Two (2) meetings were held—one with the officers on June 25, 1975 and the following officers were in attendance: John Hayes, Fin. Sec.; Ray Arnot, Pres.; Jean Luczak, Trustee; Clarence S. Walczak, Vice Pres.; John T. Bukowski, Treas.; Terry McPeak, Trustee; George B. Watts, Administrator and Staff Representative. The other meeting was with the officers and membership on Wednesday, July 16, 1975. Twenty-seven (27) persons were in attendance.

We found that this plant has been on strike since February 7, 1972, with approximately 160 members at

the start. Many of those 160 persons have since returned to the employment of this strike bound plant, crossing the picket line.

The Company's withdrawal of its tentative agreement on the Union Shop Clause with the Steelworkers left the plant without Steelworker's representation.

There is litigation pending. Because of the pendency of that litigation and to safeguard this Union fund ($42,000), we recommend that this local remain under administration.

Respectfully submitted,

AARON H. JACKSON
Sub-District Director and
Chairman of the Commission

W. REX HARRIS
Staff Representative and
Secretary of the Commission

AHJ:WRH:jlb

cc: Charles G. Younglove, District Director
George B. Watts, Staff Representative

Exhibit E

United Steelworkers of America
AFL-CIO • CLC
Five Gateway Center, Pittsburgh, Pa. 15222

Phone: (412) 562-2400

September 16, 1975

USA, Sept. 18, 1975. Rec'd-Bay City

Mr. George B. Watts, Staff Representative
United Steelworkers of America
1104 South Madison Avenue
Bay City, Michigan

Re: Case #A-3260—Investigation-Administratorship
Local Union 14055, District 29,
United Steelworkers of America

Dear Sir and Brother:.

We are enclosing, herewith, copy of report of the International Commission in the above-captioned case.

Please be advised that the above-captioned case will be one of those heard by the International Executive Board at its meeting which will commence at 10:00 a.m. on October 20, 1975, in the International Executive Board Room, Room 1209, Five Gateway Center, Pittsburgh, Pennsylvania. The Board will endeavor to conclude its hearings on October 20 but the hearings will be continued on October 21, if necessary.

You may present your appeal in person or submit a statement in support thereof by mail.

The International Union cannot be responsible for any lost time or expenses incurred as result of your appeal.

Sincerely and fraternally yours,
WALTER J. BURKE
International Secretary-Treasurer

cc: Director Younglove
Raymond I. Arnot
Clarence S. Walczak
Gerald Wesley
John Hayes, Jr.
John Bukowski

Exhibit F

United Steelworkers of America
AFL-CIO • CLC
Five Gateway Center, Pittsburgh, Pa. 15222

Phone: (412) 562-2400

October 23, 1975

USA, Oct. 28, 1975. Rec'd-Bay City

Mr. Raymond I. Arnot, LU-14055, USWA
Mr. Clarence S. Walczak, LU-14055, USWA
Mr. Gerald Wesley, LU-14055, USWA
Mr. John Hayes, Jr., LU-14055, USWA
Mr. John Bukowski, LU-14055, USWA

Re: Case #A-3260—Investigation-Administratorship,
LU-14055, District #29,
United Steelworkers of America

Dear Sirs and Brothers:

This is to advise you that the International Executive Board of the United Steelworkers of America, at its meeting on October 20 and 21, 1975, in Pittsburgh, Pennsylvania, adopted the report and recommendations of the International Commission in the above-captioned case.

Sincerely and fraternally yours,
WALTER J. BURKE
International Secretary-Treasurer

cc: Director Younglove
George B. Watts, Administrator

Exhibit G

United Steelworkers of America
District 29
Allen Park Office Square
7000 Roosevelt Street
Allen Park, Michigan 48101

Telephone 388-1300
Area Code 313

May 7, 1976

USA, May 10, 1976. Rec'd-Bay City

Mr. Walter J. Burke, Secretary-Treasurer
United Steelworkers of America
Five Gateway Center
Pittsburgh, Pennsylvania 15222

Dear Sir and Brother:

As you know in June, 1975, Local Union 14055 was placed under Administratorship upon my request and the recommendation of President I. W. Abel, and after a poll of the International Executive Board. The matter was later investigated by a Commission and found that the plant represented by this Local, Dow Petro Chemical Division had been on strike since February of 1972 and that many employees had returned to work crossing the picket line. Furthermore, the company's conduct in reneging on tentative agreements and in withdrawing recognition of the Steelworkers had left the plant without steelworker representation.

To safeguard the local's assets and because of litigation then pending (the Union had challenged the Company's withdrawal of recognition before the National

Labor Relations Board), it was recommended that the Local remain under Administratorship. The International Executive Board adopted these recommendations in October of 1975.

I am now convinced that the charter for this Local should be revoked and its existence formally terminated. The reasons are as follows:

(1) There is no longer any possibility that we will retain or reacquire our bargaining rights at the Dow Petro Chemical Division which was the only plant in this locals jurisdiction.

(2) Since my request last June, it has been concluded that the litigation consideration—possible pursuit of the refusal to bargain case in the courts—is no longer a factor.

(3) All legitimate claims on the local union's treasury have been satisfied.

Please take all the steps necessary to implement this recommendation.

Fraternally yours,
CHARLES G. YOUNGLOVE
Director, District 29

CGY/sv
cc: George Watts

Appendix.

Exhibit H

United Steelworkers of America
AFL-CIO • CLC
Five Gateway Center, Pittsburgh, Pa. 15222

May 13, 1976

USA, May 17, 1976. Rec'd-Bay City

Mr. George B. Watts, Staff Representative
United Steelworkers of America
1104 South Madison Avenue
Bay City, Michigan 48706

Dear Sir and Brother:

This is to advise you that the International Executive Board of the United Steelworkers of America, voted to terminate the tenure of the International Administrator and cancel Local Union 14055.

We are enclosing, herewith, Government Reports Form LM-15 (semi-annual) and LM-16 (terminal) to be completed by you. Terminal Trusteeship Financial Report Form LM-2 must be filed together with this report. All reports must be returned to this office, attention Wayne Antrim. This is in accordance with the Labor-Management Reporting and Disclosure Act of 1959.

Sincerely yours,
I. W. ABEL
President

cc: Director Younglove

Supreme Court, U. S.
FILED
SEP 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-1521
75-1609
75-1858

THE DOW CHEMICAL COMPANY,
Petitioner

v.

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.,
Respondents

PETITIONER'S REPLY TO "SUGGESTIONS OF MOOTNESS"

WILLIAM A. JACKSON
Suite 2100
10880 Wilshire Boulevard
Los Angeles, California 90024

ROBERT E. WILLIAMS
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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

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Petitioner

v.

LOCAL 14055, UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.,
Respondents

PETITIONER'S REPLY TO "SUGGESTIONS OF MOOTNESS"

INTRODUCTORY STATEMENT

The Dow Chemical Company ("Dow") filed its Petition for a Writ of Certiorari (Docket No. 75-1521) on April 22, 1976. The Solicitor General sought an extension of time until June 3, 1976, in which to study the case and decide whether or not to file a similar petition on behalf of the National Labor Relations Board (the "Board"), disclosing that the Board had requested the Solicitor General to seek review by this Court of the same judgment below on April 21, 1976. The Chief Justice granted

the extension requested by the Solicitor General on April 29, 1976. The Chamber of Commerce of the United States (the "Chamber"), which had also been a party to the proceedings below, filed its own Petition for a Writ of Certiorari (Docket No. 75-1609) on May 4, 1976.

The Union [1] responded to these developments by informally contacting the Solicitor General's office and urging that the Board's request be denied because of the pendency of internal Union proceedings which would assertedly render the case moot by revoking the charter of the Local. The charter revocation proceedings were not actually begun until after the docketing of this case, but were thereafter apparently expedited so as to be completed before the

---

[1] The named Respondent throughout these proceedings has been "Local 14055, United Steelworkers of America, AFL-CIO" and Dow will continue to refer to the Respondent as the "Union". It now appears that there will be some argument as to whether the local and international are separate parties, whether one is the *alter ego*, agent, or successor to the other, or whether they were co-conspirators with respect to the acts involved in this case. Dow does not believe it necessary to reach these questions. The same organization has at all material times continuously functioned and conducted a strike against Dow, and Dow considers internal alterations of Union organization immaterial. To minimize ambiguity in discussing the Union's new contentions, Dow will refer in this Reply to the "International" and the "Local", but for the purpose of this discussion it is not necessary to consider whether these are separate entities or merely administrative subdivisions of a single entity.

Solicitor General had decided whether to honor the Board's request.

The Solicitor General advised Dow and the Chamber of the Union's informal representations. Dow and the Chamber informally responded that: (1) the Local continued to carry on a strike against Dow regardless of its standing with the International; and (2) International Union counsel continued to actively prosecute and defend a number of other pending lawsuits on behalf of the Local without raising any suggestions of mootness. In the face of conflicting information as to the ongoing *de facto* existence of the Local, the Solicitor General decided to honor the Board's request and, after a further extension of time, filed a Petition for a Writ of Certiorari (Docket No. 75-1858) on behalf of the Board on June 24, 1976. The Solicitor General did invite the other parties to submit written confirmations of their views on the mootness question and these were appended to the Board's Petition (Board Pet. 1a-24a).

The Union has chosen not to respond to the merits of the three Petitions for Writs of Certiorari. Indeed, the Union has admitted that the question presented is an important one, effectively conceding that it meets the usual criteria for the granting of the Writ. Instead the Union has filed an opposition document entitled "Suggestions of Mootness" (cited hereinafter as "Resp. Sugg.") which presents the affidavit of a Union official as to the purported circumstances surrounding the charter revocation together with legal argument to the effect that the Court should dismiss the Petitions because of mootness.

Mootness suggestions to this Court are usually based on obvious or otherwise uncontroverted changes in factual circumstances. Such is not the case here, Dow denies the Union's assertions and submits that the affidavit proffered by the Union is false and misleading as to numerous matters which Dow can verify and appears to be of doubtful reliability as to other matters.

Since it is not likely that this Court will attempt to make findings as to these controverted matters, Dow does not believe that a lengthy argument as to specific misrepresentations would be productive at this point. It is particularly significant, however, to point out that the Union's new allegations are evasive and equivocal on the specific question of whether the Local continues to function without regard to the status of its International charter.

The primary purpose of this Reply is to discuss the legal theory advanced by the Union as to mootness. If that theory is deficient, further consideration of the truth of the new factual allegations will not be necessary. Certainly the Court should not make a finding of mootness based on contested facts outside of the record. While a remand for further factual determinations would be within the Court's discretion, the preferable procedure would be for the Court to decide the case on its merits, leaving the Union free to raise its new allegations in subsequent compliance proceedings, since they bear not on the propriety of the Board's order but only upon the Union's present ability to comply with it. And even if the case were found moot, this Court should still grant the Writ and reverse the judgment below to

assure that incomplete judicial review will not spawn any undesirable legal consequences.

STATUTE INVOLVED

Additional relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) are set forth below:

Sec. 2 [29 U.S.C. § 152] When used in this Act—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists

for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * *

Sec. 301 [29 U.S.C. § 185]

* * * *

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

ARGUMENT

A. The circumstances alleged by the Union would not support a finding of mootness.

The Respondent Union carefully explains that its contention as to mootness is based solely on events transpiring after the conclusion of the proceedings before the Court of Appeals (Resp. Sugg. at 8). It is thus clear that the Union attributes crucial and virtually exclusive significance to the administrative actions taken in May of 1976 by officials of the International for the purpose of revoking the charter of the Local (Resp. Sugg. 10a-12a). The Union then apparently assumes that *ipso facto*, upon revocation of its charter, the Local must necessarily have "ceased to exist" (Resp. Sugg. at 6).

The fallacy in this assumption is the equation of the charter revocation with cessation of existence. The Board has consistently held that since maintenance of an international charter is not essential to the continued existence of a local union as a labor organization, charter revocation is immaterial to its status under the National Labor Relations Act. *Awning Research Institute (Local 1766, Brotherhood of Carpenters and Joiners)*, 116 NLRB 505 (1956); *Kalamath Timber Company (International Woodworkers of America, Local 6-12)*, 35 NLRB 141, 143 (1941).

The Union is well aware that the Board is not satisfied that the Local has actually ceased "ongoing *de facto* existence" (Board Pet. at 14). The Board's Petition disclosed information furnished by the Chamber concerning continued Union legal assistance to Local Union members on matters relative to the

strike against Dow (Board Pet. 6a-20a). The Board likewise disclosed informtion furnished by Dow that the strike itself is still being continued by the remaining membership of the Local. (Board Pet. 21a-24a). Yet the Union carefully avoids any direct discussion of these specific points, pretending not to understand why the Board has "inexplicably" raised the question. (Resp. Sugg. at 9).

Under these circumstances the Court should assume that the Union does not deny that the strike and Union aid to the strikers continue, notwithstanding any internal organizational changes. The Union's evasion of these matters is a fatal inconsistency in its argument that the Local no longer exists. The Board has consistently held that a purportedly defunct union continues to exist for legal purposes so long as any vestige of activity remains, even though on a diminished, informal, or intermittent basis. *San Antonio Light Division, Hearst Consolidated Publications, Inc. (William D. Pearson)*, 130 NLRB 619, 622 (1961); *Montgomery Ward & Co. (United Steelworkers of America)*, 68 NLRB 369, 372 (1946); *Hygrade Food Products Corp. (Butchers Union Local 174)*, 51 NLRB 878, 879 (1943); *Bob-Lo Excursion Company (Seafarers' International Union)*, 44 NLRB 449, 450 (1942); *Universal Match Corporation (United Match Workers' Local 180)*, 23 NLRB 226, 227 (1940).

At the heart of this issue is the peculiar nature of a union as a juridical entity. In terms of common law conceptions, a labor union is merely a voluntary association. Since the law prescribes no formalities for the formation or dissolution of a voluntary association, its existence has historically been too indefi-

nite for the courts to recognize it as a distinct entity capable of suing and being sued as such. Section 301(b) of the Labor Act creates an exception to the usual rule by providing that "labor organizations" subject to the Act shall be regarded as juridical entities by the courts of the United States. The Act does not, however, prescribe any formal requirements for the formation and dissolution of labor organizations, it simply provides a definition of the term "labor organization" in Section 2(5) of the Act, a definition which Congress intentionally "phrased very broadly". S. Rep. No. 573, 74th Cong. 1st Sess. 7.

It is sometimes argued (and apparently assumed by the Union here) that the maintenance of a formal union structure of the traditional sort is essential to the existence of a "labor organization" within the meaning of the Act. "This argument is interesting but it crumbles when put against the broad language used in the statute in defining the term." *NLRB* v. *Kennametal, Inc.*, 182 F. 2d 817, 818 (3rd Cir. 1950). The loss by the Local Union of its bargaining rights is likewise immaterial to its existence. As this Court has previously ruled, the scope of activities encompassed within the Act's definition of a labor organization is far broader than collective bargaining. *N.L.R.B.* v. *Cabot Carbon Co.*, 360 U.S. 203, 210 (1959). Certainly continuation of a concerted refusal to return to work by the remaining membership of the Local Union is more than adequate by itself to establish that the labor organization continues to exist and effectively function. Cf. *Porto Mills, Inc. (Amalgamated Clothing Workers)*, 149 NLRB 1454, 1471 (1964); *Rugcrofters of Puerto Rico, Inc. (Juan Jose Arcelay)*, 107 NLRB 256, 262 (1953); *Perry*

Norvell Company (United Shoe Workers), 80 NLRB 225, 244 (1948). Indeed, almost any element of concerted activity would suffice. See *N.L.R.B.* v. *Smith Victory Corp.*, 190 F.2d 56 (2nd Cir. 1951).

In short, the local Union will continue to exist as long as its members continue to engage in concerted activity on its behalf. It cannot be "cancelled" by the stroke of a pen in Pittsburgh which is ignored by the members still striking in Michigan.

Even if all apparent activity on behalf of the Local Union were suddenly to cease, it would be mere speculation to conclude that its status as a labor organization had terminated. It has been the Board's experience that a labor organization may survive long periods of apparent "dormancy" during which it is virtually invisible but capable of "reactivation" when an opportunity presents itself. See *San Antonio Light Division, supra*, 130 NLRB at 624. "If the court makes no decision as to respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction". *N.L.R.B.* v. *Clark Bros. Co., Inc.*, 163 F.2d 373, 375 (2nd Cir. 1947). "The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices". *N.L.R.B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 568 (1950).

As a practical matter, the Court need not dwell upon the question of the Local Union's vitality. Insofar as any question of justiciability may be raised, the pertinent concern of the Court is that the case be contested with the necessary adverseness and vigor to sharpen and illuminate the issues for the benefit of the Court. See *Flast* v. *Cohen*, 392 U.S. 83, 106

(1968); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The Union contends that the purported demise of the Local means that its position may go undefended; however, this contention is presented to the Court in the course of some thirty-four pages of vigorous argument on the Local's behalf, a circumstance which suggests that it should not be taken very seriously. If a party is adequately represented before the Court, its condition in other respects is not of great concern. See, for example, *Robinson* v. *California*, 371 U.S. 905 (1962), where this Court declined to vacate its judgment in a landmark case despite discovering that the appellant had died ten days before the filing of his jurisdictional statement and ten months before judgment had been rendered in his favor.

There is no want of a true adversary contest. There is nothing abstract, feigned or hypothetical about the issues presented. There is a fully developed factual record sharply defining issues arising in a real, historical situation. "None of the concededly imperative policies behind the constitutional rule against entertaining moot controversies would be served by a dismissal in this case." *Sibron* v. *New York*, 392 U.S. 40, 57 (1968). Moreover, the issues raised are of such importance that they must inevitably return to this Court again if not decided now. "Because avoidance of repetitious litigation serves the public interest, that inevitably counsels against mootness determinations, as here, not compelled by the record." *DeFunis* v. *Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting). In contemplating the various policy considerations involved, the Court should feel free to strike a balance which favors re-

view. Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1692 (1970).

The Court may also consider the fact that the decision below condoning the Union's conduct has been widely reported. To hinder further review of that decision will necessarily encourage other unions to imitate that conduct. Cf. *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 307 (1964). Dow currently deals with many distributors of other product lines who would be vulnerable to the kind of boycott involved in this case which the Board now appears powerless to remedy as a result of the decision of the Court of Appeals. A reluctance to expose other neutral employees to similar harm is a factor which may affect Dow's position in on-going bargaining relationships with other unions at other locations. Cf. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 123-4 (1974).

The deterrent value of the Board's decision is a strong argument against a finding of mootness. As this Court has noted, the continuing dispute over the legality of the challenged practices and the public interest in having the legality of the practices settled are factors which militate against a mootness conclusion. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). This Court has shown a general inclination to reject mootness as a defense to Board orders, noting that the Labor Act is broader in purpose than the regulation of a particular incident or the protection of a particular party. *N.L.R.B.* v. *Raytheon Co.*, 398 U.S. 25, 27 (1970).[2] The Board

[2] Many state courts recognize an exception to the mootness doctrine in cases where the public interest warrants resolution of an important issue. Although this Court has never expressly recognized the public interest exception as a general principle, it has tended to give it tacit application in reviewing N.L.R.B. orders which might technically be characterized as moot; otherwise judicial review of the agency's decisions would be spotty and irregular. Note, *Cases Moot on Appeal: a Limit on the Judicial Power*, 103 U.Pa.L.Rev. 772, 784, 789 (1955).

itself is of the view that to let a single violation go unremedied may encourage an increase in the number and severity of future violations of the Act. *St. Regis Paper Company (Marcella Brendle)*, 192 NLRB 661, 662 (1971). The Board is entitled to enforcement of its orders despite the demise of a particular respondent "in order to protect the public interest in prohibiting and discouraging the commission of unfair labor practices." *N.L.R.B.* v. *Kostilnik*, 405 F. 2d 733, 735 (3rd Cir. 1969). "Vindication of the public policy of the statute" is said to be an independently sufficient ground for granting enforcement in such cases. *N.L.R.B.* v. *Electric Steam Radiator Corporation*, 321 F. 2d 733, 738 (6th Cir. 1963); *see also N.L.R.B.* v. *Colten*, 105 F. 2d 179 (6th Cir. 1939).

Although relying almost exclusively upon the charter revocation, the Union hints at other considerations which might be relevant to the question of mootness. It is true that the Union has not repeated the type of picketing which was challenged in this case since the action of the Board's General Counsel in directing the issuance of a complaint in April 1973, but this restraint has been entirely voluntary. To establish mootness, the Union has the "heavy" burden of proving that there is "no reasonable expectation that the wrong will be repeated." *United*

States v. *W. T. Grant Co.*, *supra*, at 633. The Union has never disclaimed any intention to revive its use of the secondary boycott; even if it did, such a disclaimer would not be sufficient to establish mootness. *Id.* The Union has never claimed that the strike has ended; even if it did, the end of the strike would not make this case moot. *Carpenters Union* v. *N.L.R.B.*, 357 U.S. 93, 97 n.2 (1958). At most, the Union suggests that the International believes that continued efforts in furtherance of the strike would be "futile" (Resp. Sugg. at 4) and that the strike is a "lost cause" (*Id.* at 4a). This amounts to nothing more than a suggestion that the challenged conduct may no longer be perceived as advantageous by the Union, a circumstance which "cannot satisfy the heavy burden of persuasion" which this Court has imposed upon those who interpose the defense of mootness. *United States* v. *Phosphate Export Assn.*, 393 U.S. 199, 203 (1968). Indeed, the evidence of mootness proffered by the Union consists almost entirely of the subjective opinions of Union officials and internal union administrative actions reflecting a loss of interest by such officials in continuing to pursue the objectives of the strike. It has been persuasively suggested that a "finding of mootness in voluntary cessation cases must depend on aspects of the factual situation beyond the defendant's control that make recurrence of the challenged conduct unlikely." Note, *The Mootness Doctrine in the Supreme Court*, 88 Harv. L. Rev. 373, 384 (1974). Under this standard, the proffered matters of internal union administration alleged by the Union are utterly worthless for the purpose of demonstrating mootness.

B. The Court should not make a finding of mootness based on contested allegations as to facts outside of the record, especially where such allegations bear indicia of bad faith.

Where a Board order has become "*obviously*" moot, a court may deny enforcement "without further ado". *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947). A finding of *obvious* mootness on appeal is possible when based on factual circumstances which are clear from the original record, *N.L.R.B.* v. *Armitage Sand and Gravel*, 495 F. 2d 759 (6th Cir. 1974); or facts which appear in the record after remand, *Reynolds Corporation* v. *N.L.R.B.*, 168 F. 2d 877 (5th Cir. 1948); or facts which are admitted by all parties when raised in oral argument, *N.L.R.B.* v. *McMahon dba McMahon's Sales Co.*, 428 F. 2d 1213 (9th Cir. 1970).[3]

The factual allegations which the Union suggests constitute mootness are neither admitted nor in the record. A finding of mootness, such as the Union urges, would be dispositive of the entire case. Such an important finding should not be made on the strength of a contested affidavit. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970). There has been no opportunity to cross-examine George Watts, the affiant whose credibility the Union would have

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[3] While this is not clear from the reported opinion, Dow is informed by counsel who was present at the argument of *McMahon* that the Board and the Union admitted the truth of the facts bearing on mootness.

this Court simply take on faith.[4] The opportunity to cross-examine is "even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959). In no other way can the other parties protect their rights and test the sufficiency of the alleged facts to support the finding requested by the Union. *I.C.C.* v. *Louisville & Nashville Railroad Company*, 227 U.S. 88, 93 (1913).

Dow does not admit the facts alleged in the Watts affidavit proffered by the Union, and Dow would expect that the Court would not assume that the affidavit is reliable when it contains testimony which has not been tested by cross-examination and rebuttal. Dow is by no means acting frivolously in questioning the reliability of the Watts affidavit. Much of it is incredible on its face or on the basis of other facts known to Dow, and Dow doubts that it is reliable as to other matters which would require further inquiry with the benefit of compulsory process. A detailed rebuttal to each specific misrepresentation in the Watts affidavit would be of limited value, as this Court is not in a position to judge the credibility

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[4] George Watts is a Union employee who is known to place loyalty to his employer above respect for the courts of the United States; for his open defiance of an order of the United States Court of Appeals for the Sixth Circuit in connection with the very same strike, George Watts was adjudged in contempt. *N.L.R.B.* v. *Local 14055, United Steelworkers*, unreported Civil Contempt Adjudication, May 17, 1973, Case No. 72-2105.

of conflicting allegations as to facts outside the record. It is clear, however, that the affidavit is evasive and equivocal on the question of whether the local Union continues to carry on the strike without an International charter. It is also clear from the timing of the charter revocation that its primary purpose was the frustration of this proceeding. Cf. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952). Dow must suggest that the Watts affidavit and the position taken by the Union in reliance upon it bear the indicia of bad faith.

A similar situation was presented to this Court in *Southport Petroleum Company* v. *N.L.R.B.*, 315 U.S. 100 (1942). In that case the Board had issued an order requiring Southport to remedy certain unfair labor practices. Southport refused to obey. A compromise was reached which resulted in a stipulation making the order less objectionable to Southport, and Southport agreed that it would render partial compliance. Southport still did not obey any part of the order, forcing the Board to seek judicial enforcement. Southport raised a mootness argument, offering to prove that it had been dissolved and liquidated. While the record was silent as to the motives for the dissolution, the Board pointed to the curious facts that the dissolution was undertaken by Southport just three days after execution of the stipulation of obedience and that it appeared that its business was being continued by another corporation whose connection, if any, with Southport was unclear. The Board urged that the proffered evidence of dissolution be disregarded, not only because it was immaterial, but also because of the appearance of bad faith. See the Record in *Southport* at 32, and the Board's Brief in

Southport at 6. Although the Court avoided making a definite finding as to the credibility of Southport's mootness allegations, their suspicious character did not escape the Court's notice:

> "The petitioner's conduct does, however, give point to omissions of pertinent facts from its allegations. The record makes it certain that it would gain delay by all honorable means and leaves it doubtful whether it has stopped at that." *Southport, supra*, 315 U.S. at 105.

Dow submits that the indicia of bad faith in this case are far more serious than those which were present in *Southport*, and similar treatment by this Court would be in order. To permit the Union to frustrate—or even delay—further action on this case by so transparent a maneuver would be to grant it "a powerful weapon against public law enforcement." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

C. Questions concerning the ability of the Union to comply with the order should be left for resolution at the compliance stage if necessary.

As the foregoing argument has demonstrated, the Court cannot make a finding of mootness based upon contested facts outside of the record. This leaves the Court with two options: (1) it can remand the case for further proceedings on the mootness issue; or (2) it can decide the case on its merits and, if it directs enforcement of the order, leave the union free to raise its purported inability to comply as a defense to any charge of contempt. The choice between these options is discretionary. Dow suggests that the second option better serves the Court's policy of promoting judicial economy and the legislative objective of expeditious enforcement.

It should be emphasized that this is not a case in which it is contended that a change of circumstances would cause the Board's order to have unintended and undesirable consequences; in such cases the Court is likely to consider all of the implications of the order before judgment is rendered. See, for example, *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947). This is a case in which alleged changes in circumstances, the purported dissolution of the Local Union, bear solely upon that party's ability to comply with an appropriate order. In such a case, the Court may characterize the new factual issues as more appropriate for later resolution as matters bearing upon compliance. See *Southport Petroleum Co.* v. *N.L.R.B.*, 315 U.S. 100, 106 (1942).

The *Southport* method for dealing with new factual issues bearing on mootness better serves the interest of judicial economy. While some courts have occasionally remanded cases to the Board for further findings on the possibility of compliance before deciding whether or not to grant enforcement, this procedure has been properly criticized as "cumbersome" and not in accord with the preference of this Court. *N.L.R.B.* v. *Kostilnik*, 405 F. 2d 733, 734 n.3 (3rd Cir. 1969).

Most courts have demonstrated a strong preference for following the *Southport* procedure. See *N.L.R.B.* v. *Colonial Knitting Corp.*, 464 F. 2d 949, 952 (3rd Cir. 1972); *N.L.R.B.* v. *Autotronics, Inc.*, 434 F. 2d 651, 652 (8th Cir. 1970); *Cap Santa Vue, Inc.* v. *N.L.R.B.*, 424 F. 2d 883, 886 (D.C. Cir.

1970); *N.L.R.B.* v. *Kostilnik*, 405 F. 2d 733, 734 (3rd Cir. 1969); *Retail Clerks International Association* v. *N.L.R.B.*, 366 F. 2d 642, 646 n.8 (D.C. Cir. 1966); *N.L.R.B.* v. *Electric Steam Radiator Corp.*, 321 F. 2d 733, 738 (6th Cir. 1963); *N.L.R.B.* v. *Lamar Creamery Company*, 246 F. 2d 8, 10 (5th Cir. 1957); *N.L.R.B.* v. *Haspel*, 228 F. 2d 155, 156 (2nd Cir. 1955); *N.L.R.B.* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 217-218 (5th Cir. 1954); *N.L.R.B.* v. *Somerset Classics, Inc.*, 193 F. 2d 613, 615-616 (2nd Cir. 1952); *N.L.R.B.* v. *Acme Mattress Co., Inc.*, 192 F. 2d 524, 528 (7th Cir. 1951); *N.L.R.B.* v. *Dixon*, 184 F. 2d 521, 523 (8th Cir. 1950); *N.L.R.B.* v. *Caroline Mills*, 167 F. 2d 212, 214 (5th Cir. 1948); *N.L.R.B.* v. *National Garment Co.*, 166 F. 2d 233, 238 (8th Cir. 1948); *N.L.R.B.* v. *Vail Mfg. Co.*, 158 F. 2d 664, 667 (7th Cir. 1947); *N.L.R.B.* v. *Weirton Steel Co.*, 135 F. 2d 494, 498-499 (3rd Cir. 1943).

It is clear that the overwhelming weight of judicial opinion is in accord with the general principles set forth by the Third Circuit as follows:

> "We conclude that the fact that a respondent has terminated its business [without a successor and upon death of the proprietor] is irrelevant in a petition by the Board for immediate and full enforcement of an order. Moreover, the courts should not recommit the order for consideration by the Board of the respondent's allegations of impossibility of compliance. *After* the order is enforced by this court, the Board may determine in a subsequent proceeding whether compliance is fully possible. In any event, impossibility may be raised by respondent as a defense if a contempt action is brought against her by the Board." *N.L.R.B.* v. *Kostilnik*, 405 F. 2d 733, 735 (3rd Cir. 1969) (emphasis in original, citations omitted).

It appears that there are only three reported cases in which reviewing courts have chosen the alternative of remanding for findings on mootness before deciding whether to grant enforcement of a Board order, and all involved some question as to the appropriateness of ordering the reinstatement of discharged employees after a respondent employer had gone out of business. *N.L.R.B.* v. *Gilmore Down River Chevrolet, Inc.*, 65 LRRM 3151 (6th Cir. 1967) (not officially reported); *N.L.R.B.* v. *Grace Co.*, 184 F. 2d 126 (8th Cir. 1950); *N.L.R.B.* v. *Reynolds Corp.*, 155 F. 2d 679 (5th Cir. 1946), *remanded*, 74 NLRB 1622 (1947), *enf. den.* 168 F. 2d 877 (5th Cir. 1948).[5]

[5] A remand to consider mootness must be distinguished from a remand to consider substituting a successor. Where it is clear that enforcement can be effective only if sought against a presently identifiable successor who has not been properly substituted or joined in the proceeding, a remand for this purpose may be indicated to assure that the appropriate parties are properly before the court. See *Spomer* v. *Littleton*, 414 U.S. 514 (1974). Such was the case in *N.L.R.B.* v. *Schnell Tool & Die Corp*, 359 F. 2d 39 (6th Cir. 1966), where the Board admitted that a second action for enforcement of the same order against a successor was contemplated and the court, in the interest of judicial economy, remanded so that all parties could be joined in a single proceeding. Even in this situation the remand is discretionary and the court could have granted immediate enforcement in full against the original party despite the future inevitability of successorship questions. See *Cap Santa Vue, Inc.* v. *N.L.R.B.*, 424 F. 2d 883, 886 (D.C. Cir. 1970).

The "questionable value" of electing the option to remand has been properly criticized; "since many mootness determinations turn upon speculation about future probabilities, further factual investigation is likely to be unproductive." Note, *The Mootness Doctrine in the Supreme Court*, 88 Harv. L. Rev. 373, 377 (1974). See, for example, *Reynolds Corp.*, *supra*, 74 NLRB at 1672. Where the substantive question presented by the case cannot be changed by the outcome of a remand, it is unseemly to needlessly shuttle any litigant back and forth from court to court hoping that somehow or other his problem will disappear. *Richardson* v. *Wright*, 405 U.S. 208, 211 (1972) (Douglass, J., dissenting).

While a remand to consider the mootness contentions in the instant case would be within the Court's discretion, Dow would urge the Court to proceed to decide the case on its merits, an approach for which *Southport Petroleum* is ample precedent. Dow is confident that a remand would establish that the Local Union does indeed continue in existence as a clearly functioning labor organization. But even if no evidence of current function could be found, it would then be necessary to consider whether the Local Union is truly dead or only dormant, a highly speculative inquiry at best. There is no cogent reason for delaying enforcement of the Board's order, and it may be safely assumed that if any specific provisions, such as the posting of notices, have become impossible to perform, the Board will not insist upon literal compliance. *N.L.R.B.* v. *Caroline Mills, Inc.*, 167 F. 2d 212 (5th Cir. 1948). If the union is "truly unable" to comply, "this would no doubt be a defense to any contempt action against it." *Retail Clerks*

International Association v. *N.L.R.B.*, 366 F. 2d 642, 646 n.8 (D.C. Cir. 1966) (Burger, C.J.). A remand would inevitably entail considerable additional delay in ultimately securing court enforcement of the Board's order. Congress recognized that contempt of court is the only effective sanction to compel compliance with the Labor Act and Congress intended that judicial enforcement of Board orders would be accomplished expeditiously. "Delay in enforcement procedure due to technicalities would be especially harmful under this act." Conference Report, H. Rep. 1371, 74th Cong., 1st Sess., p. 5. The *Southport* procedure tends to effectuate that Congressional intent.

D. If the case is found moot, then the judgment of the Court of Appeals should be reversed and the decision of the Board permitted to stand as though no review had been sought.

The Union urges that the petitions for certiorari be dismissed because of mootness. The proper disposition of a case which has become moot on appeal is not as simple as the Union assumes. The Court may still "make such disposition of the whole case as justice may require." *Walling* v. *Reuter Co.*, 321 U.S. 671, 677 (1944).

Although Dow contends that this case is not moot, if the Court should make such a finding it would be Dow's contention that the judgment of the Court of Appeals should still be reversed or vacated, if not on the merits, then in accordance with the established practice of this Court in disposing of cases which become moot on appeal. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). This is especially important in the instant case, as the Board's

decision represents an important policy determination in the construction of a statute by the agency charged with its administration. Where complete judicial review is frustrated by mootness in such a case, the judgment of the court below should be eliminated for stare decisis reasons. See Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. Chi. L. Rev. 77, 86 (1955). It is important that the ability of the Board to continue to take the position which it has taken in this case not be prejudiced by permitting the judgment of the Court of Appeals to stand when further review has become impossible without any fault on the Board's part. Cf. *United States* v. *Hamburg-American Co.*, 239 U.S. 466, 477-8 (1916).

The supervisory power of this Court over the judgments of the lower federal courts is a broad one and may be properly utilized "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear, supra*, 340 U.S. at 40-41. In exercising this supervisory power so as to assure a just disposition, the Court has even gone so far as to vacate the judgment of a Court of Appeals and restore an original judgment of a District Court which had been reversed as though no appeal had been taken from the original judgment. *Walling* v. *Reuter Co., supra*, 321 U.S. at 677. Justice would be best served by a similar result in this case. The statutory provision for review of Board orders contemplates more than consideration by the Court of Appeals alone. The judgment of the Court of Appeals, which is not final because the case is pending in the Supreme Court, cannot rightly be made the implement for depriving Dow of the benefit

of the Board's order if the completion of review is frustrated.

CONCLUSION

For the foregoing reasons, The Dow Chemical Company submits that the case is not moot and that its petition for a writ of certiorari should be granted.

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